(1)

Supreme Court, U.S.
FILED

952052 JUN 19 1996

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

J.R. KOOG, SHERIFF, VAL VERDE COUNTY, TEXAS, AND BILL MCGEE, SHERIFF, FORREST COUNTY, MISSISSIPPI

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

85 pp

QUESTION PRESENTED

The Brady Handgun Violence Prevention Act, 18 U.S.C. 922(s)(2), provides, *inter alia*, that, within five business days of a firearms dealer's proposal to transfer a handgun, the "chief law enforcement officer" (CLEO) (the chief of police or sheriff) of the transferee's residence shall make a "reasonable effort" to ascertain whether the transferee's receipt or possession of the handgun would be in violation of the law. The Act also requires (18 U.S.C. 922(s)(6)(B) and (C)) that the CLEO shall, upon request, provide the would-be purchaser with a written explanation of reasons for a conclusion that the transfer would be unlawful, and shall destroy records relating to the transfer upon a conclusion that no legal impediment to a handgun sale exists.

The question presented is whether these provisions of the Brady Act exceed Congress's power under the Commerce Clause or contravene the Tenth Amendment.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Reasons for granting the petition	8
Conclusion	8
Appendix A	1a
Appendix B	29a
Appendix C	60a

TABLE OF AUTHORITIES

Cases:

Mack v. *United States*, cert. granted, No. 95-1503 (June 17, 1996)	8
New York v. *United States*, 505 U.S. 144 (1992)	6, 7
Printz v. *United States*, cert. granted, No. 95-1478 (June 17, 1996)	4, 8

Constitution and statutes:

U.S. Const. Amend. X	5, 6, 7
Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, Tit. I, 107 Stat. 1536	2
Gun Control Act of 1968, Tit. I, 18 U.S.C. 921 *et seq.*:	
18 U.S.C. 922(d)	2
18 U.S.C. 922(g)	2
18 U.S.C. 922(s)(1)(A)	3
18 U.S.C. 922(s)(1)(A)(i)(I)	3
18 U.S.C. 922(s)(1)(A)(i)(III)	3
18 U.S.C. 922(s)(1)(A)(i)(IV)	3
18 U.S.C. 922(s)(1)(A)(ii)(I)	3
18 U.S.C. 922(s)(1)(A)(ii)(II)	3
18 U.S.C. 922(s)(1)(C)	3
18 U.S.C. 922(s)(1)(D)	3
18 U.S.C. 922(s)(2)	4
18 U.S.C. 922(s)(3)(A)	3
18 U.S.C. 922(s)(6)(B)(i)	5

Statutes–continued: Page

18 U.S.C. 922(s)(6)(C) 5
18 U.S.C. 922(s)(7) 5
18 U.S.C. 922(s)(8) 3
18 U.S.C. 922(t)(1) 2
18 U.S.C. 922 note 2
18 U.S.C. 926 4

Miscellaneous:

37 Fed. Reg. 11,696-11,697 (1972) 4
59 Fed. Reg. 37,534 (1994) 3
H.R. Rep. No. 344, 103d Cong., 1st Sess. (1993) 2

In the Supreme Court of the United States

OCTOBER TERM, 1995

No.

UNITED STATES OF AMERICA, PETITIONER

v.

J.R. KOOG, SHERIFF, VAL VERDE COUNTY, TEXAS, AND BILL MCGEE, SHERIFF, FORREST COUNTY, MISSISSIPPI

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-28a) is reported at 79 F.3d 452. The opinion of the district court in *Koog* v. *United States* (App., *infra*, 29a-59a) is reported at 852 F. Supp. 1376. The opinion of the district court in *McGee* v. *United States* (App., *infra*, 60a-73a) is reported at 863 F. Supp. 321.

JURISDICTION

The judgment of the court of appeals was entered on March 21, 1996. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Title I of the Gun Control Act of 1968 (GCA), 18 U.S.C. 921 *et seq.*, establishes a comprehensive federal regulatory scheme governing the manufacture and distribution of firearms in interstate commerce. Under the GCA, it is unlawful for certain persons, such as convicted felons and fugitives from justice, to receive or possess firearms in interstate commerce. See 18 U.S.C. 922(g). Under the GCA, it is also unlawful for any person to transfer a firearm to another, knowing that the transferee is prohibited by Section 922(g) from receiving or possessing a firearm. See 18 U.S.C. 922(d).

In the Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, Tit. I, 107 Stat. 1536 (1993) (Brady Act), Congress amended the GCA to address the national "epidemic of gun violence" by enhancing enforcement of its restrictions on gun transfer. See H.R. Rep. No. 344, 103d Cong., 1st Sess. 7-8 (1993). The Brady Act requires the federal government to establish a national instant criminal background check system by the start of 1999. 18 U.S.C. 922 note. Once the national instant criminal background check system is in place, firearms dealers will be required (with certain exceptions) to refer any proposed firearm transfer to that system to determine whether any legal impediment exists to the sale. 18 U.S.C. 922(t)(1).

Because the national instant criminal background check system may not be fully operative until late 1998, Congress also enacted interim provisions to enhance enforcement of the GCA's transfer restrictions. Those interim provisions, which are the subject of this case, operate in relation to proposed trans-

fers of handguns by federally licensed firearms dealers. Under the interim provisions, firearms dealers who propose to transfer a handgun must provide the "chief law enforcement officer" (CLEO) of the transferee's residence[1] with information about the proposed transfer, and may not make the transfer until five business days have elapsed after providing such notice. See 18 U.S.C. 922(s)(1)(A). If, within that five-day period, the CLEO informs the dealer that the CLEO has no information that the transferee's receipt or possession of a handgun would be illegal, then the transfer may go forward. See 18 U.S.C. 922(s)(1)(A)(ii)(II). The transfer may also go forward after five days if the dealer receives no information from the CLEO at all. See 18 U.S.C. 922(s)(1)(A)(ii)(I).

To enable CLEOs to determine whether receipt of a handgun would be illegal, prospective gun purchasers must provide firearms dealers with their name, address, and date of birth. 18 U.S.C. 922(s)(1)(A)(i)(I) and (3)(A). The dealer then must pass on the content of the statement to the jurisdiction's CLEO. 18 U.S.C. 922(s)(1)(A)(i)(III) and (IV). During the ensuing five-day waiting period, the CLEO "shall make a reasonable effort" to determine whether a legal impediment exists to the proposed sale:

---

[1] The Brady Act defines the "chief law enforcement officer" as "the chief of police, the sheriff, or an equivalent officer or the designee of any such individual." 18 U.S.C. 922(s)(8). The Brady Act's interim provisions do not apply in States and Territories that have their own background check requirements. 18 U.S.C. 922(s)(1)(C) and (D); see 59 Fed. Reg. 37,534 (1994).

> A chief law enforcement officer to whom a transferor has provided notice * * * shall make a reasonable effort to ascertain within 5 business days whether receipt or possession [of the handgun] would be in violation of the law, including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General.

18 U.S.C. 922(s)(2).

Shortly after enactment of the Brady Act, the Bureau of Alcohol, Tobacco and Firearms (ATF), which is charged with interpretation and implementation of the GCA (see 18 U.S.C. 926; 37 Fed. Reg. 11,696-11,697 (1972)), issued an open letter providing guidance to CLEOs on, *inter alia*, the "reasonable effort" provision. See 95-1478 U.S. Resp. App. 13a-17a.[2] ATF explained that, since CLEOs themselves are in the "best position to determine" what constitutes a "reasonable effort," "[e]ach * * * CLEO will have to set it[s] own standards based on its own circumstances, *i.e.*, the availability of resources, access to records, and taking into account the law enforcement priorities of the jurisdiction." *Id.* at 14a-15a. ATF further explained that, while the Act generally "anticipates some minimal effort to check commonly available records," CLEOs are not obliged to check "every conceivable record system that may contain information relating to categories of prohibited persons." *Id.* at 13a-14a. ATF also made clear that, since the "vast majority of [disqualified] persons * * * are

---

[2] "95-1478 U.S. Resp. App." refers to the appendix to the United States' response to the petition for a writ of certiorari filed in *Printz* v. *United States*, cert. granted, No. 95-1478 (June 17, 1996).

prohibited by virtue of some criminal background," a CLEO's reasonable effort should normally focus on criminal history records. *Id.* at 14a. Finally, ATF noted that, in some limited circumstances, such as when the CLEO has personal knowledge of a gun purchaser, a CLEO may legitimately decide that it is "reasonable" to do no research at all. *Id.* at 14a-15a.

The Brady Act does not require that a CLEO act to prevent the transfer of a handgun if the CLEO concludes that the purchaser's receipt of the gun would be illegal. Thus, if the CLEO determines, for investigative or law enforcement purposes, that the transfer should be permitted to go forward, the CLEO may decline to inform the firearms dealer that the transfer is unlawful. If, however, the CLEO finds no impediment to the proposed handgun sale, the records related to the referral from the firearms dealer must be destroyed. 18 U.S.C. 922(s)(6)(B)(i). And if the CLEO determines that the prospective purchaser's receipt of the handgun would be unlawful and so informs the dealer, the CLEO must, upon request from the prospective purchaser, provide written reasons for the determination within 20 business days. 18 U.S.C. 922(s)(6)(C). The Brady Act provides CLEOs with immunity from damages actions for failing to prevent an unlawful handgun sale, or for mistakenly concluding that a transfer would be contrary to law. 18 U.S.C. 922(s)(7).

2. a. Respondent Koog is the Sheriff of Val Verde County, Texas. App., *infra*, 30a. He contends that several of the Brady Act's interim requirements, including the requirement that he make a "reasonable effort" to ascertain if there is a legal impediment to a handgun sale, violate the Tenth Amendment. He relies for that contention principally on this Court's

application of the Tenth Amendment in *New York* v. *United States*, 505 U.S. 144 (1992).

Sheriff Koog filed suit in the United States District Court for the Western District of Texas, seeking a declaration that the Brady Act is unconstitutional and an injunction against its enforcement. The district court held that the Brady Act provisions at issue do not contravene the Tenth Amendment. The court rejected the argument that "the federal government may *never* mandate *any* action by state officials," App., *infra*, 55a, and stated that "the Tenth Amendment does not prevent the federal government from imposing minimal duties on state executive officers," *id.* at 56a. Finding that the duties imposed on CLEOs by the Brady Act are "temporary" and "minimal" in nature, the court concluded that the Brady Act does not violate the Tenth Amendment. *Ibid.*

b. Respondent McGee is the Sheriff of Forrest County, Mississippi. App., *infra*, 4a. He filed suit in the United States District Court for the Southern District of Mississippi, contending, *inter alia*, that the Brady Act's interim provisions are unconstitutional.

The district court held that the "reasonable effort" requirement violates the Tenth Amendment. App., *infra*, 67a-71a. Although the court "[did] not feel that the responsibilities placed upon local sheriffs by Brady [are] particularly onerous," it concluded that the background-check provision did transgress the Tenth Amendment's "division of authority between the federal government and the states," as construed in *New York* v. *United States*, *supra*. App., *infra*, 67a-71a. The court concluded, however, that the requirements that the CLEO destroy records

relating to background checks and provide, on request, written reasons for barring a handgun sale are "clearly de minimis" and therefore constitutional. *Id.* at 70a & n.5. It also held that the "reasonable effort" provision is severable from the remainder of the Brady Act, including the Act's five-day waiting period for handgun sales. *Id.* at 71a-72a.

3. On a consolidated appeal in both *Koog* and *McGee*, the court of appeals held that the interim duties imposed on CLEOs by the Brady Act contravene the Tenth Amendment. App., *infra*, 1a-25a. It concluded that those requirements "transgressed the Tenth Amendment principle that [Congress] may not 'commandeer[] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" *Id.* at 2a (quoting *New York* v. *United States*, 505 U.S. at 176). The court reasoned that the interim duties imposed on CLEOs "are tantamount to forced state legislation" (App., *infra*, 15a); that the Brady Act "undermines state sovereignty by requiring a State to allow CLEOs to perform duties that the State obviously prefers to avoid" (*id.* at 18a); and that it "blurs accountability" because, the court reasoned, "[f]or citizens that encounter the palpable consequences of this law, Congress is nowhere to be found" (*id.* at 20a). The court also ruled, however, that the invalidated portions of the Brady Act are severable from the remainder of the Act, including the requirement of a five-day waiting period before the transfer of a handgun. *Id.* at 25a-28a.

REASONS FOR GRANTING THE PETITION

The question presented by this petition is the same as the question presented in *Printz* v. *United States*, cert. granted, No. 95-1478 (June 17, 1996), and *Mack* v. *United States*, cert. granted, No. 95-1503 (June 17, 1996). Accordingly, the petition in this case should be held pending the decision in *Printz* and *Mack*.

CONCLUSION

The petition for a writ of certiorari should be held pending the decision in *Printz* v. *United States*, cert. granted, No. 95-1478 (June 17, 1996), and *Mack* v. *United States*, cert. granted, No. 95-1503 (June 17, 1996), and then disposed of as appropriate in light of the decision in those cases.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JUNE 1996

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-50562

J.R. KOOG, SHERIFF, VAL VERDE COUNTY, TEXAS,
PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

No. 94-60518

BILL MCGEE, SHERIFF, FORREST COUNTY,
MISSISSIPPI, PLAINTIFF-APPELLANT, CROSS-APPELLEE

v.

UNITED STATES OF AMERICA,
DEFENDANT-APPELLEE, CROSS-APPELLANT

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF TEXAS

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF MISSISSIPPI

Filed: March 21, 1996

Before: JOLLY and BENAVIDES, Circuit Judges, and DUPLANTIER,* District Judge.

E. GRADY JOLLY, Circuit Judge:

The question presented is whether the interim provision of the Brady Handgun Violence Protection Act, 18 U.S.C. § 922(s) (Supp. V. 1993), is consistent with the United States Constitution. The interim provision requires local law enforcement officers to conduct background checks, provide written explanations of denials to prospective purchasers, and to destroy records of the local background check. These duties are imposed on the local officials until a national background check system is in place. We conclude that by imposing these duties on local officials whose offices and duties are defined by state statutes, Congress has transgressed the Tenth Amendment principle that it may not "commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *New York v. United States*, 505 U.S. 144, 176, 112 S.Ct. 2408, 2428, 120 L.Ed.2d 120 (1992) (quotation omitted). We therefore hold that the interim duties imposed on local law enforcement officers by the Brady Act are unconstitutional. We further hold that the remainder of the interim provision, including the duties imposed on federally-licensed firearms dealers and the five-day waiting period prior to purchasing a handgun, is severable from the invalidated duties, and thus survives this constitutional challenge.

---

* District Judge of the Eastern District of Louisiana, sitting by designation.

I

A

The Brady Act is designed to prevent federally licensed firearms importers, manufacturers, and dealers from selling handguns to ineligible persons. It does so by subjecting all prospective purchasers to a waiting period of up to five days and a background check before allowing them to purchase a handgun. By November 30, 1998, a national automated system will provide the necessary verification. In the meantime, however—and this is the focus of this appeal—the Act's interim provision requires the local Chief Law Enforcement Officer ("CLEO") to perform the background check. 18 U.S.C. § 922(s)(1)(A)(i)(III), (IV). The CLEO may be the local chief of police, the local sheriff, or his equivalent or designee. 18 U.S.C. § 922(s)(8). The mandated background check by the CLEO applies only where state law does not provide for an instant background check or state-issued permit system, 18 U.S.C. § 922(s)(1)(C), (D), as is the case in twenty-four States, 59 Fed.Reg. 37534 (July 2, 1994).

This interim provision first requires federally-licensed firearms dealers to obtain the name, address, and date of birth of each prospective buyer, together with a sworn statement containing certain personal information of the buyer. 18 U.S.C. § 922(s)(1)(A)(i)(III), (IV). The dealer is then required promptly to forward this information to the CLEO where the buyer resides. *Id.* Upon receiving the information, the CLEO must "make a reasonable effort to ascertain within 5 business days whether receipt or possession would be in violation of the law, including research in whatever State and local recordkeeping

systems are available and in a national system designated by the Attorney General." 18 U.S.C. § 922(s)(2). The dealer lawfully may sell the handgun to the prospective buyer if the CLEO notifies the dealer during the five-day period that he "has no information" that would disqualify the purchaser, or if the five-day period expires without a response from the CLEO. 18 U.S.C. § 922(s)(1)(A)(ii)(I), (II). In certain circumscribed instances, a dealer may dispense with the background check entirely.[1]

Once the CLEO approves a particular handgun transaction, the statute requires that he destroy all records of his investigation within twenty days. 18 U.S.C. § 922(s)(6)(B). In addition, if the CLEO disapproves of a sale, the denied applicant may demand a written explanation and the CLEO must furnish it within twenty days. 18 U.S.C. § 922(s)(6)(C). In instances in which the CLEO provides erroneous information, which results in a denial of a firearm application, the disappointed applicant also "may bring an action against the State or political subdivision responsible for providing the erroneous information." 18 U.S.C. § 925A.

B

J.R. Koog and Bill McGee, the elected sheriffs of Val Verde County, Texas, and Forrest County, Mississippi, respectively, sought declaratory and injunctive relief from the interim provision of the

---

[1] For example, a background check may not be required for dealers in certain extremely remote locations, for prospective buyers who demonstrate that they need a handgun "because of a threat" to the buyer's life or the life of a family member, and for handgun transfers pre-approved by the Secretary of the Treasury. 18 U.S.C. § 922(s)(1)(F), (B), (E).

Brady Act. In Koog's case, the district court upheld the Brady Act. *Koog v. United States*, 852 F.Supp. 1376 (W.D.Tex.1994). Finding that "no single decision controls the entire spectrum of Tenth Amendment analysis," the court concluded that the Brady Act "resemble[d] more" the statute upheld in *FERC v. Mississippi*, 456 U.S. 742, 102 S.Ct. 2126, 72 L.Ed.2d 532 (1982), than the partially invalidated statute in *New York v. United States*, 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992). *Koog*, 852 F.Supp. at 1387-88. In McGee's case, the court enjoined the application of the interim provision as to him. Guided by *New York*, the court held that "Congress cannot direct and compel local sheriffs to carry out the provisions of the Brady Bill." *McGee v. United States*, 863 F.Supp. 321 (S.D.Miss.1994). Koog and the United States filed notices of appeal from the respective judgments of the district courts, and we consolidated the two cases for this appeal.

C

On appeal, the sheriffs argue that the interim provision of the Act violates the Tenth Amendment by compelling them to administer the Brady Act in violation of *New York*. *New York*, 505 U.S. at 188-90, 112 S.Ct. at 2435 ("The Federal Government may not compel the States to enact or administer a federal regulatory program."). The United States defends the interim provision as an instance of "cooperative federalism." It argues that by "administer," the *New York* Court was referring to administrative *rule-making*. Thus, the government argues that although Congress cannot require a state legislature or administrative agency to formulate policy, it may, in the spirit of cooperative federalism, require state and

local government officials in this instance to implement policy decisions that have been formulated on the national level.

II

We begin by observing that the essence of the constitutional question before us is one of means, not ends. No one disputes that Congress could have established a separate federal system of background checks, staffed by federal officers, having all the burdensome features of which the sheriffs complain—background checks, record destruction and written explanations of denials. Notwithstanding the power to act directly, Congress chose in the Brady Act to make CLEOs the exclusive agents of the federal government for conducting background checks. The issue before us is whether Congress has exceeded its authority under the Constitution, contrary to the Tenth Amendment, by ordering the implementation of federal firearms policy in this manner.

A

(1)

The Tenth Amendment states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Although the arguments of the parties are couched in Tenth Amendment terms, the Tenth Amendment does not independently provide a substantive limitation on the powers of the United States. Instead, the Tenth Amendment simply makes plain that the federal government possesses only the powers that have been given to it by the Constitution—and no more. *See United States v. Darby*, 312 U.S. 100, 61

S.Ct. 451, 85 L.Ed. 609 (1941), 505 U.S. at 154-58, 112 S.Ct. at 2417-18.

Nevertheless, "the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States." *New York*, 505 U.S. at 157, 112 S.Ct. at 2418. The Supreme Court extensively discussed such implied limitations on federal power in *New York v. United States*. The parties argue, and we agree, that *New York* is central to the question before us. Because *New York* guides our decision, we examine it in some detail.

In *New York*, the Supreme Court considered the constitutional authority for a variety of methods—ranging from outright coercion to conditional spending grants and threats of preemption—by which Congress may urge the States to adopt a legislative program consistent with federal directives. There, the court invalidated one of the provisions of the Low-Level Radioactive Waste Amendments of 1985 (the "Amendments"), which ordered state governments either to take full legal title to certain radioactive waste created by private entities, and consequently incur liability for any damage caused by the waste, *or*, alternatively, to regulate the waste according to federal mandates. *New York*, 505 U.S. at 173-76, 112 S.Ct. at 2427-28. The federal government acted beyond its constitutional powers, the Court held, because it "crossed the line distinguishing encouragement from coercion." *Id.* at 175, 112 S.Ct. at 2428. According to the Court, the take-title provision "'directly compell[ed the States] to enact and enforce a federal regulatory program,' an outcome that has never been understood to lie within the authority

conferred upon Congress by the Constitution." *Id.* (citation omitted).

In contrast, the Court upheld the Amendments' monetary and access incentives as permissible efforts to induce a state regulatory response. The monetary incentive permitted States to collect a surcharge on radioactive waste they received from other States, and to pay a percentage of that surcharge to the Secretary of Energy, to be held in escrow; once the States had achieved a series of milestones, it was eligible to receive a portion of the escrowed money. *Id.* at 169-72, 112 S.Ct. at 2425-26. The access incentives authorized States with disposal sites within their boundaries gradually to increase the cost of access to those sites, and then to deny access altogether, to non-sited States not meeting certain federal deadlines. *Id.* at 173-75, 112 S.Ct. at 2427. The Court found these incentives to be permissible because they allowed state autonomy to be preserved. Under the monetary and access incentives,

> [a] State whose citizens do not wish it to attain the Act's milestones may devote its attention and its resources to issues its citizens deem more worthy; the choice remains at all times with the residents of the State, not with Congress. The State need not expend any funds, or participate in any federal program, if local residents do not view such expenditures or participation as worthwhile.

Id. Importantly, when a state's citizens decline a federal grant or choose not to regulate a particular activity despite a preemption threat, Congress is forced to act for itself and thus to "bear the expense of a federally mandated regulatory program." *Id.* at 168, 112 S.Ct. at 2424.

The boundary between federal power and state power, the Supreme Court explained, is encased in the Constitution's structural design. The Framers devised "a Constitution that confers upon Congress the power to regulate individuals, not States." *Id.* at 165, 112 S.Ct. at 2423. As such, Congress "lacks the power to compel the States to require or prohibit [certain] acts," *Id.*, "even where Congress has the authority under the Constitution to pass laws requiring" individuals to perform such acts, *id.* Thus, Congress may regulate interstate commerce directly pursuant to the Commerce Clause, but the Commerce Clause "does not authorize Congress to regulate state governments' regulation of interstate commerce." *Id.* The Supreme Court forcefully and emphatically concluded:

> States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government. The positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart. The Constitution instead "leaves to the several States a residuary and inviolable sovereignty," The Federalist No. 39, p. 245 (C. Rossiter ed. 1961), reserved explicitly to the States by the Tenth Amendment.
>
> Whatever the outer limits of that sovereignty may be, one thing is clear: The Federal Government may not compel the States to enact or administer a federal regulatory program.

Id. at 167-69, 112 S.Ct. at 2424; *see also U.S. Term Limits, Inc. v. Thornton*, —— U.S. ——, ——, 115

S.Ct. 1842, 1872, 131 L.Ed.2d 881 (1995) (Kennedy, J., concurring) (observing that the Constitution "establish[es] two orders of government, each with its own set of mutual rights and obligations to the people who sustain it and are governed by it").

The Supreme Court explained further that the "two orders of government" created by the Constitution—state and national—force each to be accountable and responsive to their respective constituencies. *Id.* at 167-69, 112 S.Ct. at 2424. Each method of federal encouragement of the States blessed in *New York*—the carrot of conditional spending grants and the stick of preemption threats—preserve this political accountability by permitting a State to forego participation in the federal initiative. *Id.* It is this ability to walk away from the federal program that enables a State to maintain control over its policies, notwithstanding the conditions and constraints imposed on the States by the federal incentive.[2] Where a State chooses to participate in a federal program, the State has made a political choice for which it properly may be held accountable by its constituency. In contrast, a federal demand that States enact a federal regulatory program strips state officials of control over state policies and diminishes the accountability of both state and federal officials. *Id.* As the Supreme Court explained:

> But where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the

---

[2] Even though the federal government sets the terms of participation, the States are held accountable for opting into the federal government's "all or nothing, take it or leave it" program.

> federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.

Id.

From this rather lengthy review of *New York*, we derive the following guiding principles. First, the federal government may not coerce the States into administering a federal regulatory program or into legislating according to a federal formula. Second, the touchstone of this impermissible coercion is whether the States are precluded from rejecting the role envisioned for them by the federal government. Third, unconstitutional coercion of the States threatens state sovereignty because it strips States of choice and control over state policies. Fourth, and finally, federal commandeering of state governments blurs political accountability, a democratic value protected by the principles of federalism.[3]

---

[3] Eight years prior to the Supreme Court's opinion in *New York*, Judge Wisdom succinctly summarized the principles embodied there:

> Acts that regulate "states as states" are inconsistent with the constitutional assumption of federalism, because such acts force the states to administer congressional policy judgments. In effect, such acts convert state agencies into tools of federal policy, and thereby threaten the independence of the states. The suspect character of such acts, then, is that the states are *compelled* to carry out the federal policy.

State of Tex. v. United States, 730 F.2d 339, 356 (5th Cir.1984) (emphasis in original).

(2)

We now must decide whether the interim provision, when measured against *New York*'s guiding principles, encroaches on the sovereignty of the States in violation the Tenth Amendment, either by forcing the States to administer a federal regulatory program or by compelling the States to enact state legislation according to a federal formula.

We begin by noting the conceptual difficulty presented by the Brady Act, which is not neatly categorized as either forced administration or forced legislation by the States. The Brady Act artfully skirts the "forced administration box" by issuing mandates not to the "States as States" directly—that is, not to the state legislatures or administrative agencies—but to the chief law enforcement officers of each political subdivision in the State. Thus, one might argue that Congress engaged in a certain legislative legerdemain in an attempt to fashion its will to meet constitutional muster. Because the Brady Act issues no directives to *state* officials, it is difficult to say that Congress has compelled the *States* to administer its new federal firearms policy. Congress, then, escapes the force of *New York*'s bright-line prohibition that the federal government may not compel the States to "enforce a federal regulatory program" merely by casting its net in the direction of local officials rather than state employees.[4]

---

[4] We note, however, that the CLEOs' duties under the Brady Act appear to constitute "administration" of a federal regulatory scheme. The government argues that one "administers" a federal regulatory program only by making "the package of regulatory policy judgments" a legislative body or executive agency may make. Because the interim

duties are "ministerial," the government asserts, the CLEO cannot be said to have administered the Brady Act functions.

We believe that this definition unreasonably restricts the meaning of "administration." Administration is commonly understood to include an action, the purpose of which is "to direct or superintend the execution, use or conduct of" something. *Webster's Third New International Dictionary of the English Language, Unabridged* 27 (1993). Here, the CLEOs oversee the day-to-day functions demanded by the Brady Act (background checks, record destruction, written explanations of denials), functions which presumably are performed by the CLEOs' deputies and the CLEO himself. Common sense suggests that when the CLEO oversees background checks performed by his deputies, he "superintend[s] the execution" of the interim duties.

Although the term "administration" plainly encompasses the CLEOs' oversight of the day-to-day functions required by the Brady Act, the CLEOs, if not the State qua State, fairly can be said to "administer" Congress' firearms policy even under the government's more restrictive definition. The Brady Act requires the CLEOs to make the essential policy choices raised by the Act, namely, to decide exactly how intrusive a background search to conduct. *See* 18 U.S.C. § 922(s)(2) (requiring the CLEO must "make a *reasonable* effort to ascertain within 5 business days whether receipt or possession would be in violation of the law") (emphasis added). The CLEOs, not Congress, are to gauge the intrusiveness and cost, paid with local tax dollars, of an extensive background check. And the CLEOs, not Congress, are to weigh these negatives against the extent of community support for background checks and any benefits that background checks may bring, such as increased safety to the community. In the most fundamental sense, the CLEOs are crafting a local solution to what the Brady Act recognized as a national problem. Congress, thus, foists the core policy decision raised by the Brady Act onto the CLEOs. This certainly is a regulatory policy judgment sufficient to constitute "administration" even in the government's more restricted sense of

The Brady Act, however, does not so adroitly evade *New York*'s directive that Congress may not "commandeer[ ] the legislative processes of the States." *New York*, 505 U.S. at 176, 112 S.Ct. at 2428. Concededly, Congress has not ordered the States here, as it did in *New York*, to draft and then to enact legislation according to a federal formula—or to risk a federally-mandated penalty for failing to comply. Nevertheless, Congress has presented the CLEOs's interim duties to the States as a fait accompli. The Brady Act imposes new federally-prescribed, nondiscretionary tasks on actors, the CLEOs, whose offices are created by state law and whose duties are prescribed in the States' criminal codes, all without the consent or participation of the States. In the face of Congress' substantive amendment of state policies as to the proper role and duties of the CLEOs, the States are powerless to change the result.

In the discussion that follows, we measure the interim duties imposed on the CLEOs by the Brady Act against each of the principles we have discerned in *New York*. We conclude that the interim duties effectively "commandeer[ ] the legislative processes of the States" and, in violation of the Tenth Amendment, cross the line from permissible encouragement of a state regulatory response into that constitutionally forbidden territory of coercion of the sovereign States.

---

that term, especially when the CLEO can be sued for the malperformance of those duties.

(a)

First, we find that the interim duties imposed on the CLEOs are tantamount to forced state legislation. These provisions of the Act effectively bypass the state legislative process and substantively change the enacted policies of state governments. Prior to the imposition of the Brady Act, neither the Texas nor the Mississippi criminal code required CLEOs to perform the duties that the federal government imposes on them under the Act. *See* TEX.REV.CIV.STAT.ANN. art. 4413(29ee) (West 1995);[5] MISS.CODE ANN. § 45-9-101(6)(b) (1993).[6] The CLEOs' offices are created by state law, *see, e.g.*, TEX. CRIM.PROC.CODE ANN. § 2.12 (West 1995); MISS.CODE ANN. §§ 19-25-1 & 21-3-3 (1993), and the state criminal codes prescribe the CLEOs' duties and powers, *see, e.g.*, TEX.CRIM.PROC.CODE ANN. § 2.13 (West 1995) (duties of peace officers); MISS. CODE ANN. § 19-25-1 *et seq.* (1993) (duties of sheriffs); MISS.CODE ANN. § 21-21-1 *et seq.* (1993) (duties of chiefs of police). Following the Act, the federal government imposes additional duties on the CLEOs beyond those prescribed by state statute—namely, to use federally-specified law enforcement methods (i.e., background checks, destruction of

---

[5] Article 4413(29ee) permits peace officers, effective January 1, 1997, to submit an affidavit requesting suspension or revocation of a concealed weapon carry permit and stating the reason the officer believes revocation or suspension is warranted.

[6] Section 45-9-101(6)(b) permits sheriffs, with compensation, to participate "at [their] discretion" in the process of issuing concealed weapon permits, by submitting a voluntary report to the state agency issuing such permits.

records, and written explanations of denials) to execute and administer a federal policy to prevent the acquisition of handguns by disqualified individuals, a duty which is found in no state legislation.[7] Simply put, the interim duties imposed by the Brady Act constitute an edict to CLEOs that substantively enlarges the duties and authority given the CLEOs by the States, without the States' consent or participation. Like the take-title provision in *New York*, the Brady Act "offers a state government no option other than that of implementing legislation enacted by Congress." *Id.* at 177, 112 S.Ct. at 2429.[8]

---

[7] The Brady Act readily can be understood as amending a State's criminal code when the Act *adds a new duty* to those already required of the CLEO under state law, as is the case in Mississippi and Texas. A more problematic question may arise when the State *already requires* its CLEOs to perform Brady-like background checks. Although we expressly do not pass on the question, it seems to us that the discretion of such States is unconstitutionally infringed as a result of the Brady Act. Any attempt by these States to pare back the authority of the CLEOs to perform such checks would simply have no effect given the fact that federal legislation independently authorizes and requires a federal background check.

[8] We have considered the possibility that municipalities in Mississippi and Texas may have enacted local gun control laws that enlarge the existing duties of their local law enforcement officials without seeking state legislative approval. Although we make absolutely no judgment as to the authority of municipalities in Texas or Mississippi to enact such ordinances absent state legislation, we note that such local handgun ordinances do not implicate the federalism concerns raised by the Brady Act. The Constitution speaks to, and we are concerned here with, legislative directives foisted upon the States from above–by the federal government–rather than those imposed upon the States from within. In the case of local ordinances, moreover, a State retains the authority to reverse

(b)

Second, Congress further has encroached on Tenth Amendment principles by securing the CLEOs' participation only by coercing the States. The Brady Act gives the States no means by which they can assist in the implementation of federal policy while leaving unchanged the duties of the CLEOs as prescribed in the States' criminal codes.[9] The Brady Act mandates that the CLEOs act as the exclusive agents of the federal government for carrying out the interim duties. No choice is offered. The States may not say to Congress, "We are not interested in having state and local officials in our State, whose offices we create and duties we define, administer this federal regulatory scheme. If you want to conduct background searches of all persons purchasing handguns, look to your own federal background checkers."[10]

---

the actions of the municipality by state legislation (or has contracted that authority away in granting certain local governments "home rule" powers).

[9] More precisely, the Brady Act provides the State no alternative to having the CLEOs perform the interim duties other than to adopt a local permit or background check system. 18 U.S.C. § 922(s)(1)(D).

[10] The government maintains that "*FERC* makes clear that 'the Tenth Amendment does not prevent the federal government from imposing minimal duties on state executive officers,'" citing *FERC v. Mississippi*, 456 U.S. 742, 102 S.Ct. 2126, 72 L.Ed.2d 532 (1982), and *South Carolina v. Baker*, 485 U.S. 505, 108 S.Ct. 1355, 99 L.Ed.2d 592 (1988). We find these cases inapposite. In *FERC*, the Supreme Court upheld a federal statute that encouraged States in various ways to develop programs to combat the national energy crisis. In *New York*, the Supreme Court explained that permissible encouragement existed in *FERC* because the underlying statute "require[d] only consideration of federal standards.

Because the State has no walk-away opportunity, however costly or difficult, the States are victims of impermissible federal coercion.

(c)

Third, the Brady Act further undermines state sovereignty by requiring a State to allow CLEOs to perform duties that the State obviously prefers to avoid. In a world of fixed and limited law enforcement resources, federally-mandated duties frustrate a State's ability to have CLEOs perform state-chosen responsibilities, such as the enforcement of local

---

And if a State has no utility commission, or simply stops regulating in the field, it need not even entertain the federal proposals." *New York*, 505 U.S. at 161-63, 112 S.Ct. at 2421. Critically, the underlying statute in *FERC*, unlike the Brady Act, lacked anything that "directly compell[ed] the States to enact a legislative program." *Id.*

South Carolina v. Baker is equally inapplicable, albeit for a somewhat different reason. There, the Supreme Court upheld against a Tenth Amendment challenge a federal tax code provision that denied an income tax exemption for unregistered state bonds. The Court treated the tax provision involved "as if it directly regulated States by prohibiting outright the issuance of bearer bonds" and therefore as a "generally applicable federal regulation." *Baker*, 485 U.S. at 511, 514, 108 S.Ct. at 1360, 1362. In *New York*, the Court announced that it has no occasion to revisit *Baker* and other decisions, such as *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985), as they involve instances "in which Congress has subjected a State to the same legislation applicable to private parties." *New York*, 505 U.S. at 160, 112 S.Ct. at 2420. In contrast, the Brady Act, like the statute at issue in *New York*, "concerns the circumstances under which Congress may use the States as implements of regulation; that is, whether Congress may direct or otherwise motivate the States to regulate in a particular field or a particular way." *Id.*

laws, the maintenance of jails or the transportation of criminals. Plainly, the more "federal" duties a CLEO must perform, the fewer "state" duties the CLEO has the time and resources for. Whatever the outer limits of state sovereignty may be, it surely encompasses the right to set the duties of office for state-created officials and to regulate the internal affairs of governmental bodies. *FERC*, 456 U.S. 742, 761, 102 S.Ct. 2126, 2138, 72 L.Ed.2d 532 (1982) ("[T]he power of the States to make decisions and set policy is what gives the State its sovereign nature. It would follow that the ability of a state legislative . . . body—which makes decisions and sets policy for the State as a whole—to consider and promulgate regulations of its choosing must be central to a State's role in the federal system.") (citations omitted); *see also Fay v. Noia*, 372 U.S. 391, 452, 466-67, 83 S.Ct. 822, 855-56, 863, 9 L.Ed.2d 837 (1963) (Harlan, J. dissenting) ("The right of the State to regulate its own procedures governing the conduct of litigants in its courts, and its interest in supervision of those procedures, stand on the same constitutional plane as its right and interest in framing 'substantive' laws governing other aspects of the conduct of those within its border.").

Indeed, Congress' bypass of state legislative processes here constitutes a greater incursion into state sovereignty than forcing the States to enact legislation: a bypass disposes of even the pretext of minimal state discretion that is present when the federal government forces a State to employ its legislative process to achieve a particular end. The Brady Act dispenses with the state legislature altogether and effectively enacts state legislation requiring CLEOs to perform the interim duties under the Act, without

even the nominal participation of the States' elected representatives.

(d)

Fourth, the Brady Act blurs accountability for the policy choices reflected in this legislation. The voter who must undergo a background check to purchase a handgun encounters an official whose office is created by state law and whose every duty (prior to the Brady Act) is prescribed by the State. Yet it is the national government that made the decision to subject prospective purchasers of a handgun to a waiting period of up to five days and to a background check prior to consummating the purchase. Furthermore, the Brady Act affects not only disgruntled handgun purchasers and would-be purchasers, but other individuals as well. Voters also may blame the States for the federal government's decision to spend local law enforcement funds on background checks and related paperwork rather than for matters that may be of far more local importance.

For citizens that encounter the palpable consequences of this law, Congress is nowhere to be found. Congress does not employ the CLEO, supervise his work or pay his salary; the nameplate of no federal office is on the door. But the diffusion of accountability does not end at this point. Even if the affected citizen is aware that the legislation mandating background checks springs from the national government, and then turns to the Brady Act to determine political accountability, he will find that the CLEO himself is responsible for deciding what is a "reasonable" search. Laying this responsibility on the CLEO's political doorstep permits Congress effectively to shift "the political liability for sub-

sidiary decisions from federal to state officials." Evan H. Caminker, *State Sovereignty and Subordinary: May Congress Commandeer State Officers to Implement Federal Laws?*, 95 Columbia L.Rev. 1001, 1065 (1995). Even more confusing in properly locating accountability is the fact that the prospective purchaser who is disqualified from purchasing a handgun on the basis of an erroneous background check may sue the responsible State or political subdivision. 18 U.S.C. § 925(a). In sum, we think it is clear that the implementation of federal firearms policy in this manner erodes the clear lines of political accountability that were of vital concern to the Court in *New York*.

(e)

Measured against *New York*'s guiding principles, the interim duties simply will not stand up under a constitutional challenge. Although Congress here has not issued a mandate directly to the "States as States"—that is, to state legislatures or state administrative agencies—we cannot brush away Congress' attempt substantively to amend the States' criminal codes to require new federally–prescribed, non–discretionary tasks of officials whose offices and duties are created by state law. The interim provision of the Brady Act threatens the same democratic values of state sovereignty and accountability that were placed at risk by the take-title provision in *New York*. Moreover, we believe that permitting Congress to circumvent the coercion principle by issuing commands directly to state and local officials critically diminishes the separate and sovereign dignity of the States recognized by *New York*.

B

We are mindful that the Ninth Circuit Court of Appeals, in concluding that the Act is constitutional, found "nothing unusually jarring to our system of federalism in the Brady Act's requirements that CLEOs . . . 'make a reasonable effort to ascertain' the lawfulness of handgun purchases." *Mack v. United States*, 66 F.3d 1025, 1029 (9th Cir.1995). For the Ninth Circuit, the interim provision is "no more remarkable than . . . the federally-imposed duties of state officers to report missing children or traffic fatalities." *Id.* at 1029-30 (citations omitted). The tasks imposed on the CLEOs are "not alien to [the CLEOs'] usual line of work, and represent minimal interference with state functions." *Id.* at 1031.

With due respect for our sister circuit and its distinguished panel of judges, we cannot agree. First, our understanding of the principles of federalism does not permit us to characterize the Brady Act as a "minimal interference with state functions." *Id.* at 1031. We do not consider it a minimal interference when a local sheriff or chief of police is offered no choice but to devote purely local manpower and monetary resources to check the backgrounds of countless applicants for handgun purchases. In performing these federally-mandated background checks, CLEOs are required to parse "whatever State and local recordkeeping systems are available and [to check] in a national system designated by the Attorney General." 18 U.S.C. § 922(s)(2). Neither do we consider it minimal that the CLEOs must provide written explanations of denials to purchasers and destroy the records of the local background checks. 18 U.S.C. § 922(s)(6)(C). And surely the federal

intrusion is not minimal when the political subdivision that employs a CLEO may be subject to suit and judgment if the CLEO, in administering purely federal legislation against his will to do so, provides erroneous information that leads to an applicant's disqualification from purchasing a handgun. 18 U.S.C. § 925(a).

Second, and more fundamentally, we cannot accept the Ninth Circuit's apparent constitutional rationale that, in any event, federal intrusions on state functions may be of little real concern when they are essentially a minimal intrusion—in effect, because "no one's boat is being seriously rocked." The Supreme Court explicitly rejected such a defense where the federal government coerces the States to legislate according to a federal formula. The Supreme Court instructed in *New York*:

> No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate . . . . Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents.

New York, 505 U.S. at 178, 112 S.Ct. at 2429. Because it is clear that the interim provision amounts effectively to forced legislation, and thus violates one of the most important of all principles of federalism, it does not matter "how powerful the federal interest involved" nor how much the intrusion may be downplayed.

C

We pause to address one final justification for the Brady Act. The government argues, and presents some evidence,[11] that the Framers contemplated that the federal government might "make use of the State officers and State regulations" in certain matters. From this evidence of the Framers' intention, the government extrapolates that the Brady Act may be justified as simply one more instance of cooperative federalism.

The sparse reference by the Framers to the possibility of shared state and federal government responsibility makes it difficult to interpret the Framers' exact intent in this respect. We nevertheless agree with Justice O'Connor that "[n]one of the [Framers'] suggestions went so far as to propose congressional control of state legislative power. The suggestions, moreover, seemed to assume that the States would consent to national use of their officials." *FERC*, 456 U.S. at 797 n. 35, 102 S.Ct. at 2157 n. 35 (O'Connor, J., partial concurrence and partial dissent). Intuitively, it seems to us that there can be no cooperative federalism where one party prefers *not* to cooperate. Neither can there be cooperative federalism where, as is the case here, one party is never given the opportunity to decide whether to cooperate.

---

[11] The government cites *The Federalist*, No. 36 at 227 (Hamilton) (J. Cooke ed.) (discussing collection of taxes), and *The Federalist*, No. 36 at 227 (Madison) (J. Cooke ed.) ("Indeed it is extremely probable that in other instances, particularly in the organization of the judicial power, the officers of the States will be cloathed with the correspondent authority of the Union.").

D

In sum, we conclude that Congress, in directing the CLEOs to perform the interim duties prescribed in the Act, crosses the line separating encouragement from coercion and attempts to relegate the States to acting as subordinate agents of the federal government. Accordingly, we hold that the background checks, record destruction and written explanations of denials imposed on the CLEOs by the Brady Act are unconstitutional in violation of the Tenth Amendment.

III

Having determined that a portion of the interim provision of the Brady Act is invalid, we must consider whether any other part of the provision still may be given effect. As a practical matter, once the interim duties are severed, only the obligations imposed on federally-licensed firearms dealers and a five-day waiting period would remain. *See, e.g.*, 18 U.S.C. § 922(s)(1)(A)(i)(I), (ii)(I). In arguing that the invalidated duties are inseverable from the remainder of the interim provision, the sheriffs focus almost wholly on Congress' intent in enacting the five-day waiting period.

We again return to *New York* for our standard: "'Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.' " 505 U.S. at 186, 112 S.Ct. at 2434 (quoting *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684, 107 S.Ct. 1476, 1480, 94 L.Ed.2d 661 (1987)). The relevant

inquiry is "whether the statute will function in a manner consistent with the intent of Congress." *Alaska Airlines*, 480 U.S. at 685, 107 S.Ct. at 1480 (emphasis omitted).

Where Congress itself has provided the answer to the question of severability, however, by including such a provision in the legislation, a presumption of severability arises. *INS v. Chadha*, 462 U.S. 919, 932, 103 S.Ct. 2764, 2774, 77 L.Ed.2d 317 (1983). This presumption may be overcome only by "strong evidence" that Congress would not have enacted the law without the invalidated portions of the statute. *Alaska Airlines*, 480 U.S. at 686, 107 S.Ct. at 1481.

We conclude, as the district court in *McGee* did, that a presumption of severability applies to the Brady Act. The Act amends Section 922 of Title 18 of the United States Code, which codifies the Gun Control Act of 1968. Section 928 of the Gun Control Act provides that "[i]f any provision of this chapter or the application thereof to any person or circumstance is held invalid, the remainder of the chapter and the application of such provision to other persons not similarly situated or to other circumstances shall not be affected thereby." 18 U.S.C. § 928. This language is unambiguous and indicates Congress' intent that the validity of the Gun Control Act as a whole or in part should not hinge on the validity of any other part. We can only assume that Congress was fully aware of Section 928 when it chose to insert the Brady Act into Title 18, and that Congress intended the severability provision to apply equally to the Brady Act provisions.[12]

---

[12] The sheriffs argue that a presumption of severability does not arise because the Brady Act does not amend the Gun

Moreover, the sheriffs have not provided a convincing argument that, absent the background check and related duties, Congress would have declined to enact the remainder of the interim provision. Although the provision both imposes obligations on federally-licensed firearms dealers—the constitutionality of which is not challenged—and mandates a five-day waiting period, the sheriffs focus solely on the latter in arguing for inseverability. Specifically, the sheriffs argue that the five-day waiting period exists solely to permit the CLEO to perform a background check to verify that the transaction is not illegal. They point to the fact that the waiting period applies only where the Brady Act requires a background check to be performed, *see, e.g.*, 18 U.S.C. § 922(s)(1)(D) (exempting States with an instant check or permit system from the background check *and* the waiting period), that the waiting period may be dispensed within a number of situations, *see* 18 U.S.C. § 922(a)(1)(A)(ii)(II), (B), (E), and that it expires with the enactment of the national instant criminal background check or in sixty months, whichever comes

---

Control Act but instead creates a new "program." In the past, the Supreme Court has "doubted" the applicability of a severability clause in pre-existing legislation to a later act because the challenged section, "unlike many sections of the [new act] . . . does not amend provisions of . . . [the] pre-existing statute, but instead establishes a new program." *Alaska Airlines*, 480 U.S. at 686 n. 8, 107 S.Ct. at 1481 n. 8. The sheriffs' argument faces two problems. Foremost, Congress' express intention in the Brady Act was to "amend" Section 922 of Title 18. *See* Brady Handgun Violence Prevention Act, § 102(a)(1), Pub.L. No. 103-159, 107 Stat. 1536 (1993). In addition, the Brady Act arguably does not provide a new program but instead adds to the Gun Control Act's existing prohibitions on handgun transfers.

first, *see* 18 U.S.C. § 922(s)(1). Given the myriad exceptions to the waiting period, the sheriffs argue, Congress could not have intended the waiting period independently to serve as a "cooling off" period. Although we agree that these exceptions cast doubt on the notion of an independent "cooling off" period, we cannot conclude, in the light of the strong presumption of severability created by Section 928, that Congress would have failed to enact the obligations imposed on federally-licensed firearms dealers, as well as the waiting period, if the now–invalidated duties had not been included. Accordingly, we find that invalidated duties are severable from the remainder of the interim provision of the Brady Handgun Violence Protection Act.

IV

In sum, we declare that the interim duties imposed on the CLEOs by the Brady Handgun Violence Protection Act, 18 U.S.C. § 922(g), including the mandatory background checks, record destruction and written explanations of denials, are unconstitutional. We further hold that the remainder of the interim provision, including the obligations imposed on federally–licensed firearms dealers and the five-day waiting period prior to purchasing a handgun, is severable from the invalidated duties and therefore survives this constitutional attack. We thus AFFIRM the judgment in *McGee v. United States* and REVERSE the judgment in *Koog v. United States* and REMAND *Koog* for entry of judgment dismissing the complaint.

No. 94-60518 is AFFIRMED.

No. 94-50562 is REVERSED and REMANDED for entry of judgment.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

Civ. A. No. DR-94-CA-8

SHERIFF J.R. KOOG, VAL VERDE COUNTY, TEXAS,
PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

Filed: May 31, 1994

ORDER ON CONSTITUTIONALITY

PRADO, District Judge.

On this date came on to be considered the status of the above-styled and numbered cause. After careful consideration of all the papers and pleadings on file and the evidence and arguments of counsel presented at the hearing in this matter held on April 15, 1994, this Court is of the opinion that all relief requested by Plaintiff in this case should be denied.

THE BRADY ACT

Plaintiff, the Sheriff of Val Verde County, Texas ("Sheriff Koog") filed this action on March 9, 1994, seeking a declaration that 18 U.S.C. § 922(s) violated the Tenth[1] and Fifth Amendments[2] to the United States Constitution and seeking injunctive relief against enforcement of that section. The Brady Act, Pub.L. No. 103-159, 107 Stat. 1536 (1993), created § 922(s) and changed the procedure for buying handguns[3] in this country. Sheriff Koog, relying on *New York v. United States*, —— U.S. ——, 112 S.Ct. 2408,

---

[1] U.S. Const. amend. X states:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

[2] U.S. Const. amend. V states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

[3] The Brady Act defined "Handgun" by amending 18 U.S.C. § 921(a) to create a new subsection (29) which states:

> The term 'handgun' means—
>
> (A) a firearm which has a short stock and is designed to be held and fired by the use of a single hand; and
>
> (B) any combination of parts from which a firearm described in subparagraph (A) can be assembled.

120 L.Ed.2d 120 (1992), contends that § 922(s) incorporates "state governments into the service of federal regulatory purposes, and would for this reason be inconsistent with the Constitution's division of authority between federal and state governments." *Id.* —— U.S. at ——, 112 S.Ct. at 2428. Sheriff Koog also argues that the Brady Act subjects him to criminal penalties without clearly defining his duties in violation of the Due Process Clause of the Fifth Amendment. The Court held a hearing on Sheriff Koog's motion for a preliminary injunction on April 15, 1994, which the parties agreed to convert to a full trial on the merits pursuant to Federal Rule of Civil Procedure 65(a)(2).

Under § 922(s) a handgun purchaser must provide the seller with a valid photograph identification containing the purchaser's name, address, and date of birth. Furthermore, the purchaser is: 1) not under indictment for or convicted of a felony; 2) not a fugitive from justice; 3) not an unlawful abuser of controlled substances; 4) not been committed to a mental institution; 5) not an alien unlawfully in the United States; 6) not dishonorably discharged from the armed forces; 7) and has never renounced United States Citizenship. The seller must then verify the identity of the transferee and furnish a copy of the purchaser's statement to the chief law enforcement officer in the county where the purchaser resides. A sale of a handgun may not be completed until either five days have passed and the chief law enforcement officer has not notified the seller that the purchase would be unlawful or the seller has learned from the chief law enforcement officer that the sale would not be unlawful, whichever is sooner.

The Brady Act also places duties on the chief law enforcement officer[4], a state officer, in every locality. Pursuant to § 922(s)(2), chief law enforcement officers receiving information on possible gun sales, must make a "reasonable effort" to determine in five days if the sale would be unlawful.[5] If the chief law enforcement official does not find that the sale would violate any laws, then that official must destroy any information provided within 20 days.[6] Should a chief law enforcement officer block a sale of a handgun, the rejected purchaser can require that officer to provide

---

[4] 18 U.S.C. § 922(s)(8) defines 'chief law enforcement officer', "For purposes of this subsection, the term 'chief law enforcement officer' means the chief of police, the sheriff, or an equivalent officer or the designee of any such individual."

[5] 18 U.S.C. § 922(s)(2) states in its entirety:

> A chief law enforcement officer to whom a transferor has provided notice pursuant to paragraph (1)(A)(i)(II) shall make a reasonable effort to ascertain within 5 business days whether receipt or possession would be in violation of the law, including research in whatever State and local recordkeeping systems are available and a national system designated by the Attorney General.

[6] 18 U.S.C. § 922(s)(6)(B) states:

> Unless the chief law enforcement officer to whom a statement is transmitted under paragraph (1)(A)(i)(IV) determines that a transaction would violate Federal, State, or local law—
>
> (i) the officer shall, within 20 business days after the date the transferee made the statement on the basis of which the notice was provided, destroy the statement, any record containing information derived from the statement, and any record created as a result of the notice required by paragraph (1)(A)(i)(III)

the reasons why in writing within 20 days.[7] Finally, the Brady Act amends 18 U.S.C. § 924(a) to make violations of § 922(s) a crime punishable by a fine of up to $1,000 and/or imprisonment for up to one year.[8]

The Brady Act makes this records check by officers of the state only temporary. Pursuant to section 103 of the act, the Attorney General must establish a national instant criminal background check system by November of 1998. After establishment of the national system, gun vendors can contact the federal system directly by phone to determine if there is reason to believe that a particular sale would be in violation of the law. Thus, state officials will only be involved in the record check function on a temporary basis.

The Bureau of Alcohol, Tobacco, and Firearms ("BATF") issued an interpretation of the Brady Act in an Open Letter to State and Local Law Enforcement Officials on January 21, 1994. Pursuant to that interpretation, each chief law enforcement official has the discretion to determine what constitutes a reasonable search of state and national records. The letter states:

---

[7] 18 U.S.C. § 922(s)(6)(C) states:

> If a chief law enforcement officer determines that an individual is ineligible to receive a handgun and the individual requests the officer to provide the reason for such determination, the officer shall provide such reasons to the individual in writing within 20 business days after the receipt of the request.

[8] The parties dispute whether the penalty provisions apply to law enforcement officials. As more fully discussed below, the Court concludes that the penalty provisions do not apply to chief law enforcement officers.

> Each law enforcement agency serving as the CLEO will have to set it (sic) own standards based on its own circumstances, *i.e.*, the availability of resources, access to records, and taking into account the law enforcement priorities of the jurisdiction. The law is designed so that the law enforcement authority who is doing the check, is the one who is most likely to have to deal with the consequences of the buyer obtaining a handgun. Therefore, the CLEO of the buyer's residence has a vested interest in conducting an appropriate check and ultimately is in the best position to determine what is reasonable.

Indeed, the BATF concludes that in certain instances the only reasonable background check is no background check, "In rural, sparsely populated counties where many handgun purchasers are personally known to the CLEO, little or no research may be necessary in many cases." The Brady Act thus gives great discretion to each chief law enforcement official to determine what is or is not a reasonable background check.

SHERIFF KOOG CAN BRING A TENTH AMENDMENT CHALLENGE

The Government argues that Sheriff Koog lacks standing to bring a Tenth Amendment challenge to the Brady Act. Although all parties referred to the Government's argument as a standing argument, the Court notes that the argument raises issues of standing, a real party in interest, and lack of capacity pursuant to Federal Rule of Civil Procedure 17(b). While confusion between these concepts occurs with some

degree of frequency,[9] the Court will maintain a rigid distinction between the issues to provide a clearer analysis in this case. Before addressing Sheriff Koog's standing, interest and capacity to present the issues in this case, the Court briefly digresses to contrast these concepts.

The standing requirement derives from the case or controversy language contained in Article III of the United States Constitution.[10] Standing doctrine encompasses both self-imposed prudential limitations on the exercise of jurisdiction and constitutionally mandated limitations that protect separation of powers. *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984). To satisfy the constitutional component of standing a plaintiff must show, "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be

---

[9] One treatise notes, "Thus, it is not surprising that courts and attorneys frequently have confused the requirements for standing with those used in connection with real party in interest or capacity principles." 6A Charles A. Wright, Arthur R. Miller, & Mary K. Kane, *Federal Practice and Procedure* § 1542 (1990).

[10] U.S. Const. art. III, § 2, cl. 1 states:

> The judicial Power shall extend to all Cases, in Law and Equity arising under this Constitution, the Laws of the United States and Treaties made, or which shall be made, under their Authority;–to all Cases affecting Ambassadors, other public Ministers and Consuls;–to all Cases of admiralty and maritime Jurisdiction;–to Controversies to which the United States shall be a Party;–to Controversies between two or more States;-between a State and Citizens of another State;–between Citizens of different States; –between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

redressed by the requested relief." *Id.* Thus a plaintiff must show an "injury in fact" resulting from the alleged unconstitutional acts challenged.

The requirement of capacity derives from Federal Rule of Civil Procedure 17. Capacity refers to a party's ability to sue and be sued in federal court. 6A Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice and Procedure*, § 1542 (1990). Capacity must be determined with reference to state law and without reference to the particular claim or defense asserted. *Id.* at § 1559. The concept of real party in interest insures that a particular plaintiff only asserts rights belonging to that plaintiff. *Id.* at § 1542.

In the present case the Court finds that Sheriff Koog possesses standing and capacity and he is at least one real party in interest. The challenged provisions of § 922(s) mandate actions by Sheriff Koog as the chief law enforcement officer of Val Verde County; actions Sheriff Koog claims are unconstitutional. Sheriff Koog thus shows personal injury (the unlawful mandates) directly traceable to Defendant's actions and likely to be cured by the injunctive and declaratory relief he requests. *See e.g., Lujan v. Defenders of Wildlife*, —— U.S. ——, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).[11]

---

[11] In *Lujan* the Supreme Court wrote:

> When the suit is one challenging the legality of government action . . . the nature and extent of facts that must be . . . proved (at the trial stage) in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or foregone action) at issue. If he is, there is ordinarily little question that the action or inaction

Questions of Sheriff Koog's capacity are more complicated. The Government argues that Sheriff Koog lacks capacity separate from Val Verde County to bring a suit in federal court. The Court finds the Government's argument unpersuasive for three reasons. First, under state law elected officials have capacity to bring suit to determine rights and responsibilities those officials maintain. A Texas appellate court explained:

> It is only logical that the Board, created by statute and elected by the citizenry, should be able to come to the Court for relief to declare its responsibilities and rights and seek protection of those powers entrusted to it by the city charter. The fact that the city charter does not specifically give the Board the power to sue does not preclude the Board from responding affirmatively to an action brought against it by the City .... It simply sought a declaration of the rights that it has pursuant to the city charter and applicable law as an elected body of the City of Robstown. The fact that the Board is delegated only proprietary functions does not prohibit the Board from bringing suit to determine what those functions entail.

Robstown v. Barrera, 779 S.W.2d 83, 85 (Tex.App.—Corpus Christi 1989). Similarly, in this case, Sheriff Koog, an elected official to an office created by the Texas Constitution, must have the right to come into court to determine his rights and responsibilities.

---

has caused him injury, and that a judgment preventing or requiring the action will redress it.

—— U.S. at ——, 112 S.Ct. at 2137.

Second, sheriffs are frequently sued for various violations of federal civil rights. Suit could not be maintained against sheriffs if they lacked capacity under state law.[12] Finally, should Sheriff Koog chose to ignore his duties under the Brady Act, a mandamus action would lie against him. Sheriff Koog must have some ability to raise his defenses to any such action and therefore he must have the corresponding right to bring a declaratory judgment action about the constitutionality of the source of any duties. 28 U.S.C. § 2201. ("In a case of actual controversy within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration . . . ").

Although Val Verde County may be a real party in interest, the Court concludes that Sheriff Koog also has that status. Sheriff Koog argues that he must expend scarce resources of his office on background checks. Such a concern implicates the county because any resources are county resources. As an elected county official, however, Sheriff Koog also has an interest in an efficient and capable sheriff's department. Therefore, Sheriff Koog has an interest in the subject of the present litigation and the Court concludes that Sheriff Koog is a proper party to bring the present constitutional challenge to the Brady Act.

---

[12] Much has been made of the fact that sheriffs do not routinely bring law suits. Perhaps the lack of litigation by sheriffs developed as a historical fact or perhaps in most affirmative litigation sheriffs would lack standing or a real interest. The Court does not need to address the non-litigious past of sheriffs in Texas. Suffice it to say that sheriffs have capacity to be sued and to sue if conditions warrant.

THE TENTH AMENDMENT AND MANDATORY DUTIES PLACED UPON THE STATES

Supreme Court decisions about the Tenth Amendment do not reflect a pattern of straight line development of a theme. Rather the cases seem to reflect a series of shifting perspectives on the nature and breadth of the powers reserved to the states under the Tenth Amendment leaving lower courts with few concrete principles to decide cases. Faced with the various and arguably contradictory precedents, this Court has no better guide than simply to align the principles enunciated in these cases on a continuum and decide where the instant case falls.

The trail begins with *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976). In that case, the Supreme Court considered amendments to the Fair Labor Standards Act ("FLSA") that made that act applicable to all employees of state and local governments. Justice Rehnquist's majority opinion held that those amendments intruded upon an inviolable area of state sovereignty "essential to separate and independent existence." *Id.*, 426 U.S. at 845, 96 S.Ct. at 2471, *quoting Coyle v. Oklahoma*, 221 U.S. 559, 580, 31 S.Ct. 688, 695, 55 L.Ed. 853 (1911). Justice Rehnquist further held that Congress could direct legislation towards individual business pursuant to its Commerce Clause powers, but could not legislate about the "States as States". *National League*, 426 U.S. at 845, 96 S.Ct. at 2471.[13]

---

[13] This Court cannot determine on which line of reasoning the Supreme Court relied. On one hand, the opinion in *National League* implies that there are certain functions of state sovereignty which cannot be invaded. On the other hand, *National League* appears to stand for the proposition that the

Justice Brennan in his dissent in *National League* argued that the Tenth Amendment does not restrain the Commerce Clause power. According to the dissent, restraints on the Commerce Clause could be found in specific provisions of the Constitution but no restraint could be found in a general concept of state sovereignty. The political process protected state's concerns about their sovereignty when facing federal statutes enacted under the Commerce Clause. 426 U.S. at 867-869, 96 S.Ct. at 2481-82. Any notion of state sovereignty that can be judicially protected was "an abstraction without substance . . . ." 426 U.S. at 860, 96 S.Ct. at 2478. For Justice Brennan then, the Tenth Amendment did not express a concept of state sovereignty limiting the powers of the federal government, rather the Tenth Amendment requires only that Congressional legislation be grounded in a delegated power. 426 U.S. at 861-862, 99 S.Ct. at 2479.

---

federal government can never require the states to do anything even if the legislation applies in a non-discriminatory manner to both private and state entities. Compare:

> We hold that insofar as the challenged amendments operate to directly displace the State's freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. 1, § 8, cl. 3

426 U.S. at 852, 96 S.Ct. at 2474, with

> It is one thing to recognize the authority of Congress to enact laws regulating individual businesses necessarily subject to the dual sovereignty of the government of the Nation and the State in which they reside. It is quite another to uphold a similar exercise of congressional authority directed, not to private citizens, but to the States as States.

426 U.S. at 845, 96 S.Ct. at 2471.

The Supreme Court next considered the Tenth Amendment and restrictions on the commerce power in *Hodel v. Virginia Surface Mining & Reclamation Ass'n.*, 452 U.S. 264, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981). Justice Marshall's opinion for the Court significantly refined the principles announced in *National League of Cities.* In *Hodel* the Court announced a three prong test to invalidate legislation on Tenth Amendment grounds: (1) the challenged statutes must regulate the states as states; (2) the statutes must impact on matters that are indisputably attributes of state sovereignty; and (3) state compliance with federal law must directly impair the state's ability to structure integral operations in areas of traditional governmental functions. 452 U.S. at 287-88, 101 S.Ct. at 2366. In a footnote, Justice Marshall further suggested that even if all three requirements are met, the legislation may still be upheld if the federal interest advanced significantly outweighs any state interest. *Id.* at note 29.

The very next year the Supreme Court again considered the Tenth Amendment and the restrictions it places on Congress' exercise of its Commerce Clause powers in *FERC v. Mississippi*, 456 U.S. 742, 102 S.Ct. 2126, 72 L.Ed.2d 532 (1982). In that case the Court considered the Public Utility Regulatory Policies Act of 1978, Pub.L. 95-617, 92 Stat. 3117 ("PURPA") which required state utility regulatory commissions and nonregulated utilities to consider, but not necessarily adopt, several rate structures and regulatory standards. Furthermore PURPA required that these entities consider the federal proposals at public hearings and issue a written statement of reasons if the utility or commission rejected any of the federal standards. PURPA also gave the federal

government and affected consumers the right to intervene in such proceedings and to seek judicial review of any decisions. The nonregulated utilities and state regulatory commissions had to submit annual reports for ten years to the federal government on consideration of the federal standards. Separately, PURPA authorized the Federal Energy Regulatory Commission to issue regulations encouraging cogeneration even if those regulations conflicted with state regulations. The Commission did issue such preemptive regulations but left state regulatory authorities the discretion to implement those regulations either through adjudicatory proceedings or issuance of regulations.

Justice Blackmun wrote the opinion for the majority in *FERC*, upholding the challenged provisions of PURPA. Justice Blackmun did not express an opinion as to whether the Tenth Amendment imported concepts of state sovereignty into limits on the commerce power or whether the Tenth Amendment merely required Congress to exercise only delegated powers. Instead Justice Blackmun found that state utility regulatory commissions were equivalent to judicial tribunals and that the federal government had the power to require these tribunals to enforce federal law under the holding in *Testa v. Katt*, 330 U.S. 386, 67 S.Ct. 810, 91 L.Ed. 967 (1947) (federal government can require state courts to hear federal claims). *FERC*, 456 U.S. at 760, 102 S.Ct. at 2138. Therefore, PURPA's preemptive regulations did not raise any Tenth Amendment concerns.

Justice Blackmun further considered whether Congress could require state regulatory commissions to consider adoption of federal standards. He rejected the Civil War view that Congress could never impose

mandatory duties on state officers. *Id.*, 456 U.S. at 761, 102 S.Ct. at 2138. Reviewing recent cases, Justice Blackmun concluded that federal statutes could require state decisionmakers to take or refrain from taking actions. *Id.*, 456 U.S. at 762, 102 S.Ct. at 2139. Because PURPA only required state utility regulators to consider federal standards and states could avoid the requirement by abolishing their utility regulators, Justice Blackmun did not find PURPA to infringe impermissibly on state sovereignty. *Id.*, 456 U.S. at 763-64, 102 S.Ct. at 2140. Importantly for Justice Blackmun, PURPA did not require the states to adopt a legislative program, even if it encouraged states to take actions that could not be mandated by federal power. *Id.*, 456 U.S. at 765-66, 102 S.Ct. at 2140-41.

Justice Powell concurred in part and dissented in part. Justice Powell disagreed with the majority that the federal government could prescribe procedures which state regulatory agencies had to follow in considering the federal proposals. Justice Powell argued that procedures define the nature of a state administrative agency and federal alteration of those procedures intruded too far on the right of states to structure their own affairs. *Id.*, 456 U.S. at 773-75, 102 S.Ct. at 2145. Justice Powell disagreed with Justice O'Connor's dissent, however finding that Congress could require state regulators to consider federal proposals. *Id.*, 456 U.S. at 775, 102 S.Ct. at 2145-46. Justice Powell thus concluded that Congress could mandate that state officials take some actions, but not others.

Justice O'Connor, laying the foundation for her *New York* decision, dissented in *FERC*.[14] Justice O'Connor returned to the notion of state sovereignty that the *National League of Cities* Court found in the Tenth Amendment. Justice O'Connor would have invalidated even those portions of PURPA that would only require the state regulatory agencies to consider federal proposals because attributes of sovereignty include the power to set a legislative agenda. 456 U.S. at 779, 102 S.Ct. at 2148. ("If Congress routinely required the state legislatures to debate bills drafted by congressional committees, it could hardly be questioned that the practice would affect an attribute of state sovereignty.") In this way, Justice O'Connor could distinguish *Testa v. Katt*, 330 U.S. 386, 67 S.Ct. 810, 91 L.Ed. 967 (1947), which held that state trial courts could not refuse to hear a federal claim if it heard similar state claims. Justice O'Connor concluded that state courts cannot set their own agendas, therefore requirements that they hear federal claims do not tread on state sovereignty. *FERC*, 456 U.S. at 784-85, 102 S.Ct. at 2126. Accordingly, for Justice O'Connor, the Tenth Amendment protects states from federal intrusions into their legislative processes, but not their judicial processes.

Justice O'Connor found another reason to distinguish federal encroachment on state legislative functions from encroachment on state judicial functions. Citizens cannot hold the proper officials accountable when the federal government forces state officials to debate federal propositions. 456 U.S. at 787, 102 S.Ct.

---

[14] Chief Justice Burger and Justice Rehnquist joined Justice O'Connor in her dissent.

at 2152. As Justice O'Connor explained, "Congressional compulsion of state agencies, unlike preemption blurs the lines of political accountability and leaves citizens feeling that their representatives are no longer responsive to local needs." *Id.*

Finally, Justice O'Connor turned to the framing of the Constitution. In her view, the framers of the Constitution reacted to the inefficiencies of the Articles of Confederation. Particularly, the framers wanted a national government that could act on individuals as opposed to states. Quoting from The Federalist No. 16, Justice O'Connor concluded, "the execution of the laws of the national government . . . should not require the intervention of the State Legislatures". 456 U.S. at 791-93, 102 S.Ct. at 2154-55. From this history Justice O'Connor concludes that the national government may only direct legislation at individuals, not the states.

Subsequently, in *EEOC v. Wyoming*, 460 U.S. 226, 103 S.Ct. 1054, 75 L.Ed.2d 18 (1983), the Court held that amendments extending the Age Discrimination in Employment Act ("ADEA") to employees of state and local governments were constitutional under the Tenth Amendment. Justice Brennan wrote the opinion for the majority. Although Justice Brennan argued in his dissent in *National League of Cities* that the Tenth Amendment imposes no restraints on exercises of the commerce power, he analyzed the ADEA in terms of the framework established in *National League of Cities* and *Hodel*. 460 U.S. at 236, 103 S.Ct. at 1060. Justice Brennan noted that the third prong of the *Hodel* test required a consideration of the degree of impairment of a state's ability to structure its integral operations. 460 U.S. at 239, 103 S.Ct. at 1062. Finding the ADEA to only slightly intrude on this

state interest, the Court upheld the challenged amendments. *Id.*

Justice Stevens concurred in *Wyoming*. Justice Stevens returned to the view expressed in Justice Brennan's dissent in *National League of Cities*. According to this view, the Tenth Amendment does not constrain Congressional exercise of the Commerce Power because the Tenth Amendment merely restricts Congress to delegated powers. 460 U.S. at 248, 103 S.Ct. at 1066-67. Justice Stevens therefore argued that *National League of Cities* should be overruled.[15] Justice Powell joined by Justice O'Connor dissented primarily to respond to Justice Stevens' concurrence. Justice Powell found that the Constitution included a notion of state sovereignty that precluded congressional action in some areas. 460 U.S. at 275, 103 S.Ct. at 1080-81.

In *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985), the Court once again addressed whether the Fair Labor Standards Act ("FLSA") could be extended to all state and local government employees. The Court specifically overruled *National League of Cities*, 469 U.S. at 536, 105 S.Ct. at 1009-10. Justice Blackmun again wrote the opinion for the majority. He first found the standard in *National League of Cities* that protected areas of traditional state functions to be unworkable because the Supreme Court could not decide how to determine which state

---

[15] Justice Burger dissented. Justice Burger disputed the majority's decision that the act did not significantly interfere with the state's ability to structure its integral governmental operations. 460 U.S. at 258, 103 S.Ct. at 1072. Justices Powell, Rehnquist, and O'Connor joined Justice Burger.

functions were "traditional". 469 U.S. at 537-47, 105 S.Ct. at 1010-15. Although Justice Blackmun agreed that the federal structure of the United States placed limits on the power of the federal government to interfere with state sovereignty, he found that those limits were unclear. 469 U.S. at 547, 105 S.Ct. at 1016.

Justice Blackmun turned to his own interpretation of the intent of the framers of the Constitution. Unlike Justice O'Connor, he did not rely on "free-standing conceptions of state sovereignty." 469 U.S. at 550, 105 S.Ct. at 1017. Instead, Justice Blackmun found Congress' power restrained because Congress could only exercise delegated powers. Furthermore, state sovereignty received protection from the states' position in the structure of the republic. Representation by state in the Senate, House of Representatives, and College of Electors preserved state interests against federal encroachment because the states had a direct voice in the formulation of federal policy. 469 U.S. at 550-551, 105 S.Ct. at 1017-18.[16]

Justice Powell wrote separately in dissent.[17] Justice Powell interpreted *National League of Cities* to require a balancing test weighing the respective

---

[16] Justice Blackmun summarized his views:

> In short, the Framers chose to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority. State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.

469 U.S. at 552, 105 S.Ct. at 1018.

[17] Justices Burger, Rehnquist, and O'Connor joined Justice Powell's dissent.

interests of the states and the federal government. 469 U.S. at 562-63, 105 S.Ct. at 1023-24. Turning to the intent of the framers, Justice Powell offered a third interpretation of the drafting and adoption of the Constitution. According to Justice Powell's version of ratification, the Tenth Amendment was so central to the Constitution that the states would have refused ratification if the Tenth Amendment had not been one of the first considerations of the new Congress. 469 U.S. at 569, 105 S.Ct. at 1027. From this history, Justice Powell concludes that the judiciary must enforce the principles of the Tenth Amendment.

Justice Powell looked to the Federalist Papers to attempt to define those inviolate areas of state sovereignty protected by the Tenth Amendment. 469 U.S. at 570-72, 105 S.Ct. at 1027-28.[18] Whatever the content of those specific areas that are either the "traditional", "typical" or "sovereign", Justice Powell believed that the judiciary had a duty to invalidate

---

[18] In attempting to define the areas of state sovereignty Justice Powell quotes from The Federalist No. 45 which states:

> The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State.

469 U.S. at 570-71, 105 S.Ct. at 1028.

> Such generalities appear open to the criticism of the majority opinion that no real standards guide the judiciary in determining what areas of state sovereignty are protected from federal encroachment. This Court cannot conceive of any legislation, federal or state that does not extend to the "lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State."

any federal action that encroached on those grounds. The courts, Justice Powell concluded, must balance the federal interest in interstate commerce with the concern of the states for local, democratic self-government. 469 U.S. at 575, 105 S.Ct. at 1030. Applying this balance to the FLSA, Justice Powell found that the states' interest in a traditional government function greatly outweighed any effect that reduced wages for municipal transportation workers might have on interstate commerce and therefore invalidated the subject provisions. 469 U.S. at 578-79, 105 S.Ct. at 1032.

Justice O'Connor also wrote a dissenting opinion in *Garcia*.[19] Justice O'Connor surveyed the vast changes in the American economy that lead to expansion of Congress' power under the Commerce Clause. Justice O'Connor argued however that both the ends and the means of Congressional legislation must be valid. 469 U.S. at 585, 105 S.Ct. at 1036. In assessing the means Congress has chosen to reach its ends, courts must consider both the letter and the spirit of the Tenth Amendment. 469 U.S. at 586, 105 S.Ct. at 1036. Therefore, if Congress attempts to regulate a matter admittedly within the commerce power, the Court must still strike down the legislation if it interferes with state autonomy. 469 U.S. at

---

[19] Justice O'Connor's opinion was joined by Justice Rehnquist and Justice Powell. Justice Rehnquist wrote a brief dissenting opinion where he expressed his view that neither Justice Powell's opinion or Justice O'Connor's opinion were completely faithful to the principles of *National League of Cities*. However, Justice Rehnquist declined to enunciate those principles. Rather he decided to wait until *National League of Cities* once again commanded a majority. 469 U.S. at 579-80, 105 S.Ct. at 1032-33.

588, 105 S.Ct. at 1037. Justice O'Connor did not define state autonomy in her dissent, rather she predicted that the Court would return to that question. *Id.*

The Court applied its analysis in *Garcia* to a section of the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA") in *South Carolina v. Baker*, 485 U.S. 505, 108 S.Ct. 1355, 99 L.Ed.2d 592 (1988). Although that section merely removed the federal income tax exemption of state and local government bearer bonds, the Court analyzed the act "as if it directly regulated States by prohibiting outright the issuance of bearer bonds." 485 U.S. at 511, 108 S.Ct. at 1360. Justice Brennan's opinion for the Court specifically found such a direct regulation of the states as states to be consistent with the Tenth Amendment as South Carolina did not show any defect in the political process that lead to the adoption of the TEFRA. State representation in that political process protected any concerns for state sovereignty. 485 U.S. at 513, 108 S.Ct. at 1361. Justice Brennan sustained the act even though it coerced both state administrative and legislative processes. 485 U.S. at 514-15, 108 S.Ct. at 1362 ("That a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect.")

Justice Scalia concurred in *Baker*. Justice Scalia argued that *Garcia* held that the Constitution imposed limits on Congress' power under the Commerce Clause but those limits were not identified. He further argued that the statute at issue did not surpass those limits. 485 U.S. at 528, 108 S.Ct. at 1369. Justice Rehnquist also concurred. He found that because the TEFRA had only a *de minimis*

impact upon the states, the act presented no Tenth Amendment concerns. 485 U.S. at 529, 108 S.Ct. at 1370. Justice O'Connor dissented. She found that the Tenth Amendment and principles of federalism required state exemption from federal taxation. 485 U.S. at 533-534, 108 S.Ct. at 1372. The concurrences and dissent all found some judicially enforceable restraint on the Commerce Clause in the Tenth Amendment although they disagreed on how to articulate that restraint or its extent.

Only in light of this fractious and complex history can the Court properly consider the Supreme Court's most recent Tenth Amendment decision in *New York v. United States*, —— U.S. ——, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992). The *New York* case addressed the constitutionality of three provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985. To encourage each state to take responsibility for low-level radioactive waste produced within its borders, Congress approved monetary incentives, access incentives denying states without plans access to current waste disposal sites, and a "take title" provision which required a state to take title to all waste that is produced but which is not properly disposed in that state after January 1, 1996. —— U.S. at ——, 112 S.Ct. at 2416.

Justice O'Connor, returning to many of the principles announced in her dissent in *FERC*, announced the opinion of the Court. Justice O'Connor reiterated her view that the Tenth Amendment incorporates extra-textual limits on the Commerce Clause:

> The Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself,

> which, as we have discussed, is essentially a tautology. Instead, the Tenth Amendment confirms the that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by a limitation on an Article I power.

—— U.S. at ——, 112 S.Ct. at 2418. Accepting that Congress' Commerce Clause power extended to the subject of low-level radioactive waste and Congress could preempt the field, Justice O'Connor then turned to whether the means Congress had chosen to achieve its ends were constitutional. —— U.S. at ——, 112 S.Ct. at 2420.

Relying on dicta in both *Hodel* and *FERC*, Justice O'Connor concluded that Congress could not commandeer the legislative process of states. —— U.S. at —— - ——, 112 S.Ct. at 2420-21. Justice O'Connor found support for this view in her review of the history of the drafting and ratification of the Constitution. The framers and ratifiers of the Constitution supported the Constitution because the federal government would have the power to legislate directly on individuals, not upon states as required under the Articles of Confederation. —— U.S. at —— - ——, 112 S.Ct. at 2421-23.[20] Although the federal

---

[20] Justice O'Connor again makes a logical leap from the proposition that Congress could direct legislation towards individuals to the conclusion that Congress could not direct legislation towards the states. The sources Justice O'Connor cites do not clearly lead to this conclusion. These sources merely indicate that the Constitution gave the federal government the

government has tools to encourage the states to adopt federal policy, Justice O'Connor held that Congress could not compel the states to regulate. —— U.S. at ——-——, 112 S.Ct. at 2423-24.

Turning to the contested provisions of the Low-Level Waste Act, Justice O'Connor found no problem with the monetary incentives or the access incentives. These incentives merely represented valid exercises of the commerce power and the spending power. —— U.S. at ——, 112 S.Ct. at 2427. The "take title" provision, however, did not pass Constitutional muster. This provision gave the states the option of either adopting a plan consistent with Congress' standards or taking title to all waste produced within their individual state. Justice O'Connor found either choice to be beyond the power of Congress and therefore not a valid encouragement but an attempt to compel one of two courses of action, neither of which Congress could compel. —— U.S. at ——, 112 S.Ct. at 2428. Justice O'Connor distinguished the take title provision from Supreme Court cases requiring state courts to enforce federal law. Those cases reflected an application of the Supremacy Clause, not a requirement that states regulate. —— U.S. at ——-——, 112 S.Ct. at 2429-30. Therefore, the Court severed the take title provision and upheld the other two provisions.[21]

---

power to legislate directly on individuals, not that the Constitution prohibited Congress from directing legislation to the states.

[21] Justice White, with Justice Blackmun and Justice Stevens joining, filed a concurring and dissenting opinion. Justice Stevens filed a dissenting opinion.

This review of the Court's recent Tenth Amendment jurisprudence reveals a wide range of views about the restrictions that Amendment places on congressional exercise of the commerce power. At one extreme, the Supreme Court has viewed the Tenth Amendment as limiting Congress to delegated powers. This view found expression in Justice Brennan's dissent in *National League of Cities*, Justice Stevens' dissent in *Wyoming*, and Justice Blackmun's majority opinion in *Garcia*. At the other extreme, the Court has found that the Tenth Amendment expresses a concept of state sovereignty that independently limits Congressional exercise of the commerce power. Justice O'Connor's dissent in *FERC* and her majority opinion in *New York* have been the strongest expressions of this view. In the center lie a variety of views. For instance, the majority opinions in *National League of Cities*, *Hodel*, and *Wyoming*, as well as Justice Powell's concurrence in *FERC*, Justice Powell's dissent in *Garcia*, Justice Scalia's concurrence in *Baker*, and Justice Rehnquist's concurrence in *Baker* all have found the Tenth Amendment to impose some restraints on Congress. Those restraints extend to "integral operations", "typical" or "sovereign" functions, or more than "*de minimis*" intrusions. Thus, this middle ground has required a balancing of state and federal interests.

Whatever view a particular justice takes of the Tenth Amendment, all agree that the federal government can require state courts to adjudicate federal law claims. Further, with the exception of the majority opinion in *Baker*, all agree that the federal government cannot require the states to legislate. Court opinions do not reflect a clear position on

whether Congress can require state executives to act pursuant to federal mandates. *Compare FERC*, 456 U.S. at 762, 102 S.Ct. at 2139 (" . . . there are instances where the Court has upheld federal statutory structures that in effect directed state decisionmakers to take or to refrain from taking certain actions.") *with New York*, —— U.S. at ——, 112 S.Ct. at 2429 ("Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents.").

After reviewing the Supreme Court's recent decisions, this Court concludes that no single decision controls the entire spectrum of Tenth Amendment analysis. Opinions such as *New York*, *Garcia*, and *FERC* all exist side by side as precedents binding on this Court.

Disregarding all prior Tenth Amendment cases, Sheriff Koog asks this Court to invalidate the Brady Act by taking a broad reading of *New York*. Indeed, Sheriff Koog in both his pleadings and at the hearing on this matter intimated that *New York* overruled *Garcia* and *FERC*. *See, e.g.*, Plaintiff's Reply To Defendant's Opposition to Motion for Preliminary Injunction, filed April 12, 1994, at pp. 23-24. Plaintiff rejects the *de minimis* test suggested by Justice Rehnquist as well as any other balancing test. Instead, Sheriff Koog argues that the federal government may *never* mandate *any* action by state officials.[22]

---

[22] At the hearing Plaintiff illustrated this broad reading of the Tenth Amendment by suggesting that the duties placed on state law enforcement agencies to report cases of missing

The Court declines to base its decision on such a broad reading of the opinion in *New York*. Nor does this Court have the authority to reject the precedential value of *Garcia* and *FERC*. Instead the Court must align all of these cases on a continuum and find the Brady Act's position on that continuum. Under *New York*, the Tenth Amendment prohibits the federal government from commandeering state legislatures. However, under *FERC*, the Tenth Amendment does not prevent the federal government from imposing minimal duties on state executive officers.

The Court concludes that the duties imposed on chief law enforcement officers including Sheriff Koog resemble more the duties created under PURPA than the command to legislate created by the Low-Level Waste Act. As noted before, the Brady Act confers great discretion on each chief law enforcement officer to determine what is a reasonable background search under the circumstances. Indeed, under the Brady Act *no* search may be required if circumstances dictate such a conclusion. Furthermore, the duties placed on chief law enforcement officers are only temporary and are phased out within five years under the terms of the act. Such duties greatly resemble the requirement that state utility regulatory bodies consider federal standards imposed by PURPA and upheld in *FERC*. The Court therefore finds the Brady Act consistent with the Tenth Amendment even though it places some minimal duties upon state law enforcement officials.

---

children, 42 U.S.C. § 5779(a), and traffic fatality data, 23 U.S.C. § 402(a), were "nice, but probably unconstitutional."

FIFTH AMENDMENT CONCERNS

Sheriff Koog also brings a Fifth Amendment challenge to the Brady Act. Sheriff Koog argues that the penalty provisions contained in § 924(a)(5) subject him to criminal liability for failing to make a reasonable effort to ascertain if a proposed sale violates the law, but the statute is unconstitutionally vague because it does not define what would satisfy the reasonable effort requirement. The Court concludes that § 924(a)(5) does not apply to violations of the duties of chief law enforcement officers under the Brady Act and therefore Sheriff Koog lacks standing to bring his Fifth Amendment challenge.

In *Gregory v. Ashcroft*, 501 U.S. 452, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991), the Supreme Court announced a new rule of statutory construction. Pursuant to this new rule, Congress must make a plain statement of its intent to exercise its Commerce Clause powers in an intrusive manner on state sovereignty. 501 U.S. at 464, 111 S.Ct. at 2403. ("Indeed, inasmuch as this Court in *Garcia* has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise.") If doubt exists as to whether a statute interferes with state sovereignty, then it must be interpreted to protect state sovereignty.

In the present case, Congress has not made a plain statement that the criminal provisions in § 924(a)(5) apply to chief law enforcement officers. Indeed, § 924(t)(6) shields chief law enforcement officials from any civil liability for actions taken pursuant to the Brady Act. Such a provision raises an issue as to whether Congress intended chief law enforcement

officials to be subjected to more serious criminal sanctions. Given the ambiguities inherent in the statute and the lack of a plain statement from Congress, the Court concludes that under the rule announced in *Gregory*, the criminal provisions do not apply to duties imposed upon chief law enforcement officers by the Brady Act.[23] Therefore, Sheriff Koog has no standing to bring his Fifth Amendment challenge.

CONCLUSION

The Court concludes that Sheriff Koog's constitutional challenge to the Brady Act must fail. Although Sheriff Koog has standing and capacity to assert a Tenth Amendment challenge, the Court concludes that the Brady Act does not violate Tenth Amendment principles because it does not "commandeer state legislatures", but instead only places minimal duties upon chief law enforcement officers. The Court further concludes that the Brady Act's criminal provisions do not apply to duties imposed upon chief law enforcement officials and, therefore, Sheriff Koog lacks standing to bring his Fifth Amendment challenge.

---

[23] The Court draws support for this conclusion from *Sheriff/Coroner Jay Printz v. United States of America*, 854 F.Supp. 1503 (D.Mont.1994), although that court reached a different conclusion on the Tenth Amendment issue. Judge Lovell examined the intent of Congress, the rule of lenity, and the rule of statutory construction requiring statutes to be construed to avoid constitutional problems and concluded that the criminal provisions do not apply to chief law enforcement officers. The Court also notes that the Department of Justice reached a similar conclusion in a Memorandum issued by the Office of Legal Counsel on March 16, 1994.

Accordingly, it is hereby ORDERED that judgment shall be ENTERED for Defendant on all of Plaintiff's claims.

It is further ORDERED that Plaintiff's complaint for declaratory and injunctive relief be DISMISSED WITH PREJUDICE.

It is finally ORDERED that all pending motions in this cause are hereby DENIED AS MOOT.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

Civ. A. No. 2:94-CV-67PS

SHERIFF BILL MCGEE, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

Filed: June 3, 1994

MEMORANDUM OPINION

PICKERING, District Judge.

This matter is before the Court on Plaintiff's Complaint seeking a declaratory judgment that the Brady Handgun Violence Prevention Act (Brady Bill) as an amendment to the Gun Control Act of 1968 is unconstitutional and for a permanent injunction prohibiting the Defendant's enforcement thereof. This Court previously denied Plaintiff's request for a preliminary injunction, 849 F.Supp. 1147 (1994).

At the hearing on Plaintiff's request for a preliminary injunction both parties agreed that this Court had before it all evidence needed to rule on the merits of the Complaint. At the request of the Court,

the parties submitted additional briefs. The Court has carefully considered the pleadings, evidence, arguments of counsel and the briefs submitted.[1]

Plaintiff now seeks to amend to bring in Forrest County, Mississippi, as an additional party plaintiff. This is apparently done in response to Defendant's strenuous argument that Plaintiff has no standing or capacity to bring this action. Since Plaintiff's Motion to Amend comes after the parties have submitted this matter to the Court for decision, bringing in an additional party at this stage of the proceeding is inappropriate. Accordingly, Plaintiff's Motion to Amend to bring in a third party plaintiff is denied. *See* Rule 20, Fed.R.Civ.P.

This Court in ruling on the request for a preliminary injunction noted:

> Determining what is or is not in the best interest of the United States and its people under the commerce clause of the Constitution is a legislative function, not a judicial function . . . Consequently, this Court has no jurisdiction, no authority, no power to question whether the Brady Bill is good policy or bad policy. That is simply not a function of the Courts.

---

[1] The Center to Prevent Handgun Violence, Major Cities Chiefs of Police, International Association of Chiefs of Police, National Association of Police Organizations, Fraternal Order of Police, Police Foundation, Federal Law Enforcement Officers Association, Police Executive Research Forum, National Troopers Coalition, National Organization of Black Law Enforcement Executives, and International Brotherhood of Police Organizations filed an amici curiae brief supporting the position of the Defendant United States of America. The briefs of amici curiae have also been considered by the Court.

Id. at page 1148.

However, Plaintiff argues that the Brady Bill is unconstitutional. That is a proper question for the courts. The portions of the Brady Bill primarily in question (18 U.S.C. § 922(s)(2) and § 924(a)(5)) are as follows:

> A chief law enforcement officer to whom a transferror has provided notice pursuant to paragraphs (1)(A)(i)(III) *shall* make a reasonable effort to ascertain within five business days whether receipt or possession would be in violation of the law, *including research in whatever* state and local *record keeping systems are available* and in a national system designated by the Attorney General.

18 U.S.C. § 922(s)(2) (emphasis added).

> Whoever knowingly violates Subsection (s) and (t) of Section 922 shall be fined not more than $1,000, imprisoned for not more than one year, or both.

18 U.S.C. § 924(a)(5) (emphasis added).[2]

Primarily, Plaintiff raises two objections to the Brady Bill. First, Plaintiff argues that the Act is contrary to Article I, Section 8 and the Tenth Amendment to the United States Constitution in that it "commandeers" a state sheriff to administer a

---

[2] 18 U.S.C. § 922(s)(6)(B) requires the CLEO to destroy any form forwarded to him by a gun dealer within twenty days, unless he has determined that providing a gun to a prospective purchaser would be violative of the law. 18 U.S.C. § 922(s)(6)(C) provides if a CLEO determines that a proposed purchase of a handgun is illegal, then the CLEO must within twenty days after request give a written reason as to why a prospective handgun purchaser is ineligible for such purchase.

federal act regulating gun purchases. Secondly, Plaintiff contends that the penalty section of the Brady Bill violates the due process clause of the Fifth Amendment in that it is unconstitutionally vague.

As this Court noted in ruling on the request for a preliminary injunction, the Court must first determine the question of standing, including the Plaintiff's capacity to sue, before it reaches the constitutional issues.

I. STANDING TO CHALLENGE THE PENALTY SECTION OF BRADY.

In order to have standing to challenge the constitutionality of a statute, one must be exposed to actual injury, or to a threat of actual injury, and relief from the injury must be likely to follow from a favorable decision. *See Allen v. Wright*, 468 U.S. 737, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984). There must be an actual "case" or "controversy." *Id.*, 468 U.S. at 750, 104 S.Ct. at 3324, 82 L.Ed.2d at 569. The evidence and stipulations before this Court establish that Defendant has interpreted the penalty section of the Brady Bill as not applicable to chief law enforcement officers (CLEO's) for failure to comply with Brady's ascertainment and background check provisions. (18 U.S.C. § 922(s)(2)). Accordingly, Plaintiff is not under any danger of criminal prosecution regardless of whether he does or does not make the required background check and ascertainment as to legality. Plaintiff can demonstrate no actual injury or threatened actual injury in regard to the penalty section, 18 U.S.C. § 924(a)(5). Thus Plaintiff does not have

standing to challenge the constitutionality of 18 U.S.C. § 924(a)(5), as amended by Brady.[3]

II. STANDING TO CHALLENGE THE ASCERTAINMENT AND RECORDS SEARCH PROVISION OF BRADY.

The second issue pertaining to standing is not as easily disposed of. Under 18 U.S.C. § 922(s)(2) the sheriff is directed ("shall") to "make a reasonable effort to ascertain . . . whether receipt or possession would be in violation of the law, *including* research in *whatever* . . . record keeping systems are available . . ." (emphasis added).

The Defendant argues that the sheriff has no standing to challenge this section of Brady because (1) he has no capacity to sue, and (2) he is not threatened with actual injury.

---

[3] This Court believes that Defendant is correct in its interpretation of 18 U.S.C. § 924(a)(5), as amended by the Brady Act. The doctrine of lenity (*U.S. v. Thompson/Center Arms Co.*, — U.S. ——, 112 S.Ct. 2102, 119 L.Ed.2d 308 (1992) and *U.S. v. Bass*, 404 U.S. 336, 347, 92 S.Ct. 515, 522, 30 L.Ed.2d 488 (1972)) as well as the principle that when a statute is susceptible to two interpretations, one of which is constitutional and the other unconstitutional, the interpretation which is constitutional should be utilized, unless such construction is plainly contrary to Congressional intent (*DeBartolo v. Florida Gulf Coast Building and Const. Trades Council*, 485 U.S. 568, 575, 108 S.Ct. 1392, 1397, 99 L.Ed.2d 645 (1988)) would require this Court to construe this section as imposing no criminal exposure upon Plaintiff, if that issue were before the Court. Further, since Defendant contends in this case that this section exposes Plaintiff to no criminal penalty, Defendant would be judicially estopped from prosecuting Plaintiff under the penalty section. All of this buttresses the Court's conclusion that Plaintiff is not threatened with any actual injury as to the criminal penalty section of Brady and thus has no standing to raise this issue.

The capacity of a state official to sue "shall be determined by the law of the state in which the district court is held . . ." Rule 17(b), Fed.R.Civ.P. Further, as amici curiae point out, in Mississippi, the state attorney general "is given the *sole* power to bring or defend a lawsuit on behalf of a state agency, the subject matter of which is of statewide interest . . . " Miss.Code Ann. § 7-5-1 (1972) (emphasis added).[4]

Neither party has cited any case directly on point decided by the Mississippi Supreme Court. The cases are clear that the appropriate body to bring an action involving counties is the board of supervisors of such county. However, that is not the situation before this Court. Brady directs sheriffs (as chief law enforcement officers) to ascertain if obtaining a gun is in violation of the law, including checking whatever records are available. This directive is not to any other public official other than a CLEO. This directive is not to the county. It is not to the attorney general. It is not to any other state agency or to any federal agency.

While it is true that cases against the "sheriff's department" are routinely dismissed by this Court because the county is the proper party, sheriffs are repeatedly sued before this Court by inmates challenging the conditions of their confinement and other civil rights violations under the Constitution of the United States.

It would be anomalous indeed if Congress can direct a sheriff to take specific action; if Congress can

---

[4] Although a sheriff of a county is not a state agency, nevertheless, this Court feels that this statute is instructive that the Attorney General should be the one to bring any action having statewide import.

provide that a sheriff may be sued in civil rights actions; and if sheriffs can be sued for deprivation of constitutional rights by inmates; but a sheriff cannot bring a suit to declare unconstitutional an action of Congress that directly impacts upon such sheriff, and impacts upon no other state, county or federal official.

Since there are no Mississippi cases directly on point this Court has the responsibility of making an *Erie* guess as to what the Mississippi Supreme Court would do if it were confronted with this question. This Court feels confident that the Mississippi Supreme Court would decide that under the facts of a case such as this that a sheriff does have the legal capacity to bring an action such as this. Sheriff Bill McGee has a "personal stake in the outcome of this litigation." *See Board of Education v. Allen*, 392 U.S. 236, 241, n. 5, 88 S.Ct. 1923, 1925, n. 5, 20 L.Ed.2d 1060 (1968). Consequently this Court rules that the sheriff has capacity to bring this suit. However, since the Attorney General is the appropriate official to bring action of statewide import, this Court concludes that this action will be applicable to this sheriff only.

As to actual injury, the Plaintiff (any CLEO) must make a reasonable effort to ascertain the legality of a proposed handgun purchase and must check "whatever" records "are available" or face civil action for injunctive relief for failure to make such a check. Under this language the sheriff is threatened with actual injury under 18 U.S.C. § 922(s). He could be enjoined to follow the mandate of Brady as enacted by Congress. Further, since he is sworn to uphold the law, his failure to make the ascertainment and record check or to challenge the constitutionality of the Act, could result in the sheriff violating his oath of office.

The voters could hold him accountable for this. That is also a threat of actual injury.

III. IS THE BRADY BILL MANDATE THAT LOCAL SHERIFFS MUST ASCERTAIN IF A PROPOSED HANDGUN PURCHASE IS LEGAL AND PERFORM CERTAIN BACKGROUND CHECKS UNCONSTITUTIONAL?

This Court is mindful that the U.S. Supreme Court has recognized various programs "of cooperative federalism." *See Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc.*, 452 U.S. 264, 289, 101 S.Ct. 2352, 2367, 69 L.Ed.2d 1 (1981). This Court likewise recognizes that the area of gun control could be an appropriate area for "cooperative federalism" if Congress should so determine. Law enforcement officials are repeatedly before this Court in cases as to which county, state and federal authorities have cooperated, one with the other, in the enforcement of drug laws and laws involving the illegal possession, sale or purchase of guns. Such cooperative efforts are not novel. They are currently being carried out quite extensively. But Congress, in the Brady Bill, did not give local sheriffs the option of cooperating with federal officials. Congress mandated and directed the sheriff to "make a reasonable effort to ascertain" the legality of a proposed handgun purchase, *including* research in "whatever" records "are available." Since the CLEO is only directed to make "a reasonable effort," defendant attempts to interpret the word "shall" as not being mandatory. However, Congress defeated an amendment that would have changed the word "shall" to "may." Further indicative of the fact that local CLEO's must take some action is in the use of the word "including." The CLEO must make a

"reasonable effort" to ascertain, "including" a record check. Thus, at a bare minimum a CLEO must check "whatever" records "are available."

In *New York v. United States*, —— U.S. ——, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992), the Supreme Court discussed what Congress can and cannot do insofar as directing state and local officials to carry out federal regulatory programs and policies under the Tenth Amendment. In that case the Court in a very thorough opinion stated:

> The constitutional question is as old as the Constitution: it consists of discerning the proper division of authority between the federal government and the states.

—— U.S. at ——, 112 S.Ct. at 2414, 120 L.Ed.2d at 133.

> Being an instrument of limited and enumerated powers it follows irresistibly that what is not conferred, is withheld and belongs to the state authorities . . . the states unquestionably do retai[n] a significant measure of sovereign authority . . .

Id., 112 S.Ct. at 2417, 120 L.Ed.2d at 137.

> As an initial matter, Congress may not simply "commandee[r] the legislative processes of the States' by directly compelling them to enact and enforce a federal regulatory program."

Id., 112 S.Ct. at 2420, 120 L.Ed.2d at 140 (citations omitted).

> This "Court never has sanctioned explicitly a federal command to the states to promulgate and enforce laws and regulations."

Id., 112 S.Ct. at 2420, 120 L.Ed.2d at 141.

> . . . Congress has crossed the line distinguishing encouragement from coercion.

Id., 112 S.Ct. at 2427, 120 L.Ed.2d at 149.

> Either type of federal action would "commandeer" state governments into the service of federal regulatory purposes and for this reason would be inconsistent with the Constitution's division of authority between federal and state governments.

Id., 112 S.Ct. at 2427, 120 L.Ed.2d at 150.

> Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents.

Id., 112 S.Ct. at 2429, 120 L.Ed.2d at 152.

> States are not mere political subdivisions of the United States Government or are neither regional officers nor administrative agencies of the Federal Government . . . .

Id., 112 S.Ct. at 2434, 120 L.Ed.2d at 158.

Insofar as this case is concerned, the most pointed holding of the Court in *New York*, was that "*the Federal Government may not compel the states to . . . administer a federal regulatory program.*" (emphasis added). *Id.*, 112 S.Ct. at 2434, 120 L.Ed.2d at 158.

Sheriff McGee testified that he did not feel that he had available sufficient records to make a reasonable ascertainment of the legality of a proposed gun check, but that checking the records which are available to him required, on average, about one and a half hours per day. Even though this Court does not feel that the responsibilities placed upon local sheriffs by

Brady is particularly onerous, nevertheless it does transgress the "proper division of authority between the federal government and the states" under *New York v. U.S.*, —— U.S. at ——, 112 S.Ct. at 2414, 120 L.Ed.2d at 133, and is more than de minimis. *See FERC v. Mississippi*, 456 U.S. 742, 102 S.Ct. 2126, 72 L.Ed.2d 532 (1982).

Accordingly, this Court finds that Congress cannot direct and compel local sheriffs to carry out the provisions of the Brady Bill as is done in 18 U.S.C. § 922(s)(2). *See also Sheriff/Coroner Jay Printz v. United States of America*, 854 F.Supp. 1503 (D.Mont.1994) interpreting the same act and reaching the same conclusion as this Court.

As much information exchange as currently goes on between federal, state and local law enforcement officials, this Court does not feel that simply requiring a CLEO to destroy forms provided to the CLEO by a gun dealer as to handgun purchases (18 U.S.C. § 922(s)(6)(B)) implicates the Tenth Amendment.[5] Likewise, 18 U.S.C. § 922(s)(6)(C) which requires a CLEO to give a reason why a gun purchase is turned down will not become mandatory on any CLEO unless he has first voluntarily decided to cooperate and comply with 18 U.S.C. § 922(s)(2).

The Brady Bill brings into conflict differing views as to the Second Amendment's "right of the people to keep and bear arms" and views on the responsibility of government to protect its citizens from violence in a society that is becoming increasingly more violent and where fear of violence is becoming the greatest

---

[5] Such requirement is clearly de minimis. *See FERC v. Mississippi*, 456 U.S. 742, 102 S.Ct. 2126, 72 L.Ed.2d 532 (1982).

fear of our people. This lawsuit, however, as noted by Judge Lovell, in *Printz v. U.S.*, *supra*, does not implicate the Second Amendment. This lawsuit involves only the Tenth Amendment and Article I, Section 8 of the Constitution.[6]

IV. SEVERABILITY.

The only other question which this Court must consider is the question of severability. That issue was likewise addressed in *New York*, *supra*, as well as in the case of *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684, 107 S.Ct. 1476, 1480, 94 L.Ed.2d 661 (1987). Unless it is "evident" that Congress would not have adopted the remainder of the act, if the unconstitutional part had been omitted, "the invalid part may be dropped if what is left is fully operative as law." *Alaska Airlines*, 480 U.S. at 684, 107 S.Ct. at 1480.

When Congress adopts a severability clause there is a presumption that the unconstitutional part of the act is severable. *Alaska Airlines*, 480 U.S. at 686, 107 S.Ct. at 1481. The Brady Bill is an amendment to the Gun Control Act, which has a severability clause. 18 U.S.C. § 928. Thus, there is a presumption in favor of severability.

Deleting Section 922(s)(2) obviously will weaken the Brady Bill and eliminate a part of the total Congressional statutory scheme for dealing with handgun purchases. But it does not follow that Congress would not have enacted the balance of the Act without mandating that CLEO's make "a

---

[6] Plaintiff also raised a Fifth Amendment due process question, but he has no standing on that issue as already pointed out.

reasonable effort" to ascertain the legality of proposed handgun purchases. Neither does it follow that the balance of the Act is not "fully operative" or functional without § 922(s)(2). If only § 922(s)(2) is declared unconstitutional, there is still a five-day waiting period, purchasers of handguns must still provide certain information to gun dealers, which in turn must be provided to the chief local law enforcement officer, who then will have the option "to cooperate" or "not cooperate" with federal officials in carrying out the provisions of Brady. The Court notes that this is merely a temporary or "stop gap" measure that remains in place only until a national instant criminal background check system is developed. *See* 18 U.S.C. § 922(t).

Plaintiff has not overcome the presumption that Congress would have passed Brady even without § 922(s)(2). The balance of Brady is "fully operational" or functional without § 922(s)(2).

V. CONCLUSION.

The Court concludes that 18 U.S.C. § 922(s)(2) is an unconstitutional mandate and directive from Congress to local chief law enforcement officers that exceeds the power granted under Article I, Section 8 and that contravenes the Tenth Amendment to the United States Constitution. Since Sheriff Bill McGee has standing to bring this lawsuit only insofar as it affects him in his official capacity and since he has no standing to bring any action on behalf of any other Mississippi law enforcement officials, this decision is limited in its application to Sheriff Bill McGee only. All other sections of the Brady Handgun Violence Prevention Act being severable under applicable case law, only 18 U.S.C. § 922(s)(2) is

hereby declared unconstitutional and void and the United States is permanently enjoined from enforcing the provisions thereof against Sheriff Bill McGee, and it is so ordered.

A separate judgment will be entered in accordance with Rule 58, Federal Rules of Civil Procedure.

SO ORDERED AND ADJUDGED.

Supreme Court, U.S.
FILED
JUN 27 1996

No. 95-2052

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

UNITED STATES OF AMERICA,

Petitioner

v.

J.R. KOOG, Sheriff, Val Verde County, Texas,
and
BILL MCGEE, Sheriff, Forrest County, Mississippi,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS

STEPHEN P. HALBROOK*
Richard E. Gardiner
10560 Main Street, Suite 404
Fairfax, Virginia 22030
(703) 352-7276
Attorneys for Respondents

*Counsel of Record

QUESTIONS PRESENTED

1. Whether Congress has power under the U.S. Constitution, Article I, §8 and the Tenth Amendment, as interpreted in *New York v. United States*, 505 U.S. 144 (1992), to command chief law enforcement officers (CLEOs) of the States: to search records and to ascertain whether persons may lawfully purchase handguns; to destroy records concerning purchasers; and to explain adverse legal determinations, as mandated by the Brady Act, 18 U.S.C. §922(s)(2), (6)(B) and (C).

2. Whether the above unconstitutional duties are severable from §922(s)(1). More particularly, whether, given Congress' purpose of preventing the registration of firearm owners, the duty of a firearms dealer to provide notice to the CLEO of a proposed handgun transfer is severable from the duty of the CLEO to destroy such records; whether the CLEO's duty to search records and ascertain the legality of a transfer is severable from the duty of the dealer to allow 5 days to elapse after such notice before making the transfer; and whether, given Congress' due process concerns, the CLEO's duty to explain his finding that a transfer is prohibited is severable from the CLEO's power to prohibit a transfer.

PARTIES TO PROCEEDING

The parties to the proceeding in the Court of Appeals were Sheriff J.R. Koog, Sheriff Bill McGee, and the United States. There are no parent companies and nonwholly owned subsidiaries to be listed.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO PROCEEDING ii

ARGUMENT 1

THE WRIT SHOULD BE GRANTED AND THIS CASE SHOULD BE CONSOLIDATED WITH *PRINTZ v. UNITED STATES, CERT. GRANTED, NO.* 95-1478 (JUNE 17, 1996) AND *MACK v. UNITED STATES. CERT. GRANTED, NO.* 95-1503 (JUNE 17, 1996) (CONSOLIDATED)

CONCLUSION 2

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

No. 95-2052

UNITED STATES OF AMERICA,
Petitioner

v.

J.R. KOOG, Sheriff, Val Verde County, Texas,
and
BILL MCGEE, Sheriff, Forrest County, Mississippi,
Respondents

BRIEF FOR THE RESPONDENTS

ARGUMENT

THE WRIT SHOULD BE GRANTED AND THIS CASE SHOULD BE CONSOLIDATED WITH *PRINTZ v. UNITED STATES, CERT. GRANTED, NO.* 95-1478 (JUNE 17, 1996) AND *MACK v. UNITED STATES. CERT. GRANTED, NO.* 95-1503 (JUNE 17, 1996) (CONSOLIDATED)

This Court has already granted a Writ of Certiorari to determine whether the Brady Act's commands to law enforcement are constitutional. *Printz v. United States, cert. granted*, No. 95-1478 (June 17, 1996) and *Mack v. United States, cert. granted*, No. 95-1503 (June 17, 1996) (consolidated). The decision being reviewed in those cases, *Mack v. United States*, 66 F.3d 1025 (1995), did not reach the issue of severability since it upheld the validity of the commands to law enforcement. This Court may or may not

consider the severability issue in the *Printz/Mack* cases. If this Court holds that the commands to CLEOs are unconstitutional but does not reach the severability issue, then that issue could only be resolved on remand with unnecessary delay and litigation.

Respondents concur with the position of the United States that this Court should grant a writ of certiorari here. However, Respondents disagree with the position of the United States that the petition in this case should be held pending the decision in *Printz/Mack*. Instead, the better course would be to consolidate this case with *Printz/Mack*.

On or about June 25, 1996, respondents here filed a conditional cross-petition for a writ of certiorari to the U.S. Court of Appeals for the Fifth Circuit on the severability issue and sought consolidation with the *Printz/Mack* cases. *J.R. Koog, Sheriff, and Bill McGee, Sheriff, Cross-Petitioners v. United States, Cross-Respondent.* The arguments of Sheriff Koog and Sheriff McGee concerning why this Court should hear the severability issue are set forth in detail in the cross-petition.

CONCLUSION

This Court should grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit. Furthermore, this case should be consolidated with *Printz v. United States*, *cert. granted*, No. 95-1478 (June 17, 1996) and *Mack v. United States*, *cert. granted*, No. 95-1503 (June 17, 1996).

STEPHEN P. HALBROOK*
Richard E. Gardiner
10560 Main Street, Suite 404
Fairfax, Virginia 22030
(703) 352-7276
Attorneys for Respondents
*Counsel of Record